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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED VAN LINES, INC.,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, JEANETTE P. SHULDA, JOHN SHULDA, CITIZENS MOVING & STORAGE, ROYAL INSURANCE COMPANY, and CALIFORNIA UNINSURED EMPLOYERS FUND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

MICHAEL G. BIGGERS
(Counsel of Record)
JOHN W. AMBERG
ROBERT A. PALLEMON
BRYAN, CAVE, MCPHEETERS & MCROBERTS
245 Park Avenue
New York, New York 10167
(212) 692-1800

Counsel for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

1. Do Department of Transportation motor carrier safety regulations and Interstate Commerce Commission equipment leasing regulations create an employer-employee relationship between an interstate motor carrier and a driver who otherwise could be considered an independent contractor, thereby subjecting the carrier to state workers' compensation laws?

2. Does the Commerce Clause of the Constitution forbid California from determining that compliance with federal regulations by interstate motor carriers creates an employer-employee relationship, thereby discriminating against interstate commerce and imposing the burdens of being an employer on interstate but not on intrastate carriers?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner states that its parent is UniGroup, Inc., and that it has no subsidiaries other than wholly-owned subsidiaries. There are no respondents not named in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO

United Van Lines, Inc. ("United") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California, Fourth Appellate District, Division Two, in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of California, Fourth Appellate District, Division Two (App. A, *post*, p. A-1) is unreported, as is the opinion of the California Workers' Compensation Appeals Board (App. B, *post*, pp. A-3 to A-20).

JURISDICTION

The judgment of Court of Appeal of California, Fourth Appellate District, Division Two, was entered on February 22, 1991. United exhausted its state remedies by filing a petition for review in the Supreme Court of California, and that court denied review on April 11, 1991 (App. C, *post*, p. A-21). The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, provides: "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

STATEMENT OF THE CASE

The decision below held that United was an employer of respondent John Shulda and his employee (and wife) Jeanette Shulda for the purpose of providing workers' compensation coverage of a claim by her. This finding was made notwithstanding a contract specifying that John Shulda was an independent contractor of a third party. It was based in substantial part upon activities undertaken by United as an interstate carrier to comply with federal laws, regulations of the Department of Transportation ("DOT"), and regulations of the Interstate Commerce Commission ("ICC"). The case therefore raises questions whether the California court's interpretation and application of these federal laws and regulations is permissible as a matter of federal law and in light of United's constitutional rights under the Commerce Clause.

A. The Contracts Between the Parties

United is a Missouri corporation primarily engaged in the interstate transportation of household goods. In the operation of

its business, United enters into contracts with local moving companies such as respondent Citizens Moving & Storage ("Citizens") to provide equipment and drivers to United for the interstate transport of household goods shipped for United's customers.

The contract between United and Citizens did not address whether Citizens would use independent contractors or employees as drivers. It did not require the drivers to perform services exclusively for United and did not require that any specific provisions be contained in a driver's contract with Citizens.

John Shulda entered into an "Independent Contractor's Agreement" with Citizens to provide services as an interstate truck driver, and he also agreed to lease to Citizens the tractor which he owned. App. B, *post*, p. A-8. Citizens in turn leased the tractor to United. There was absolutely no contract between United and John Shulda.

In his Independent Contractor's Agreement with Citizens, John Shulda negotiated for 55% of the revenue from each load he accepted, and *all* of the revenue from certain services under the Agreement, such as unpacking and hoisting.[1] John Shulda was responsible for all operating and maintenance expenses of the tractor which he owned (including the expenses of any additional personnel), for all personal expenses while on the road, for determining the details of a trip (such as which roads to use and where to stop), and for maintaining workers' compensation and liability insurance. He declared himself to be an independent contractor in his tax filings with the Internal Revenue Service.

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[1] The shipping charges to the customer were set by a federal tariff. Citizens received 71.5 cents of every dollar collected as shipping charges and paid John Shulda 55 cents from its 71.5 cents.

B. The Relevant Regulatory Environment

As an interstate common carrier, United operates in an industry heavily regulated by the federal government. In particular, it has legally-mandated responsibilities to comply with certain DOT and ICC regulations and to require drivers to comply with some of these regulations. 49 C.F.R. §§ 390.3(e) and 390.11. Thus, there is a federal statute which prohibits common carriers from mixing their interstate shipments together on the same truck (unless they have obtained prior approval from the ICC). 49 U.S.C. § 11342. An ICC regulation requires equipment leases to provide United with exclusive possession, control, and use of the equipment during the lease period. 49 C.F.R. § 1057.12. These governmental requirements, as distinguished from any rules or policies voluntarily promulgated by United, created a restriction — relied on below as supporting the decision that John Shulda was an employee of United — that John Shulda could not accept freight from other sources even when he had only a partial load. *See* App. B, *post*, p. A-13.[2]

Several other factors cited below as evidence of John Shulda's status as an employee (*Id.* pp. A-12 to A-13) are direct regulatory requirements: Shulda had to pass written and physical examinations for him to qualify as a driver for any interstate motor carrier (49 C.F.R. § 391.35 — written examination requirement; 49 C.F.R. §§ 391.41 and 391.43 — physical examination requirement); he had to maintain a daily log (49 C.F.R. § 395.8); United had to inspect his truck (49 C.F.R. § 396.3(a)); Shulda had to notify United about hiring a helper (49 C.F.R. § 392.60); any individuals who would assist Shulda with the driving had to be

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[2] In fact, the regulation on exclusivity applies only to the leased equipment, not to the driver. United did not restrict John Shulda's freedom to drive for another carrier as long as he drove a van other than the one which had been leased to United.

qualified by United (49 C.F.R. § 392.61); Shulda was required to complete certain inspection reports (49 C.F.R. § 396.11); and Shulda's tractor had to bear United's name (49 C.F.R. § 1058.2).

C. The Circumstances Giving Rise to a Workers' Compensation Claim

John Shulda allegedly hired his wife Jeanette Shulda as a helper on his truck in 1984, although he never paid her.[3] Jeanette was seriously injured in Massachusetts in June 1984 while John Shulda was unloading a shipment which had been transported interstate. App. B, *post*, pp. A-8 to A-9. It was her first trip as a "helper."

John Shulda had obtained an insurance policy for his employees issued by Transit Casualty Company, an insurance carrier in no way affiliated with United. Following Jeanette Shulda's injury, Transit paid her approximately $400,000 in benefits until January 1986, when it went into receivership after being declared insolvent. *Id.* p. A-9.

D. The Proceedings Below

Jeanette Shulda filed a claim with the California Workers' Compensation Appeals Board. On May 13, 1987, after a trial, the Workers' Compensation Judge ("WCJ") specifically found that Jeanette Shulda was employed by John Shulda, "an independent contractor," and because of Transit's collapse held the

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[3] Although Mr. Shulda testified that he applied for and received authorization for this hire from Citizens, no copy of the supposed authorization form, required by the regulations (49 C.F.R. § 392.60), was ever found. In any event, this standard form does not grant United any right to approve the hiring or termination of a helper, and it expressly recites that a helper hired by the driver is not an employee of United.

California Insurance Guarantee Association ("CIGA") liable for her continuing benefits. App. I, *post*, pp. A-69 to A-72. The Workers' Compensation Appeals Board (the "Board") modified the award to relieve CIGA of liability on the ground that the Transit policy was not a "workers' compensation policy" under California law. App. H, *post*, pp. A-62 to A-68. No modification was made to the findings regarding employment. The California Court of Appeal affirmed the Board in an unpublished opinion. App. G, *post*, pp. A-53 to A-61.

The WCJ thereafter issued a new award against the California Uninsured Employers Fund ("UEF"), but this second award was set aside by the Board and the case was remanded for further hearings on the issue of Jeanette Shulda's employment. App. F, *post*, pp. A-48 to A-52.

On July 24, 1990, the WCJ again found that John Shulda was the uninsured employer of his wife. But in a complete reversal of his previous analysis, the WCJ also concluded that John Shulda was an employee of both Citizens and United and that Jeanette Shulda was therefore an employee of Citizens and United. App. E, *post*, p. A-24. The conclusion that John Shulda was an "employee" of United rested in large part on the evidence of United's compliance with DOT and ICC regulations. App. B, *post*, pp. A-12 to A-13; App. E, *post*, pp. A-31 to A-34.

United filed a petition for reconsideration to have the case reviewed by the Board. Because the Board does not have the power to hear constitutional challenges, *Mathews v. WCAB*, 6 Cal.3d 719, 738, 493 P.2d 1165, 1177 (1972), United did not specifically raise with the Board the Commerce Clause issue presented by this case. By asserting the statutory grounds for review that the WCJ acted in excess of his power, United preserved its constitutional challenge. *E.g., National Auto & Cas. Ins. Co. v. Industrial Acc. Comm'n*, 95 Cal.App.2d 10, 16, 212 P.2d 1, 4 (1949).

On October 16, 1990, the Board denied United's petition for reconsideration. App. B, *post*, pp. A-3 to A-6. It relied on and incorporated a recommendation from the WCJ which reasserted his conclusion that conduct required by federal law represented evidence of an "employment" relationship. *Id.*, pp. A-7 to A-20.

United then filed a petition for judicial review in the California Court of Appeal, Fourth Appellate District, Division Two. The memorandum in support of this petition argued, *inter alia*, that "Elements of control of means and manner resulting from regulatory compliance are irrelevant to the determination of Shulda's relationship with United" and that "steps taken by United to comply with Federal regulations do not constitute evidence of its control over the driver." App. J, *post*, pp. A-77 & A-81. United further raised a federal constitutional challenge to this use of its compliance with federal regulations, arguing that allowing the regulations to be considered would "impermissibly burden interstate commerce." *Id.* p. A-80.

The California Court of Appeal rejected all of United's arguments and denied the petition for a writ of review, stating simply that "the ruling was supported by substantial evidence in light of the whole record." App. A, *post*, p. A-1.

REASONS WHY THE WRIT SHOULD BE GRANTED

The California court has created a conflict with the decisions of other state courts and federal courts of appeals on an important question of federal law by misinterpreting and misapplying the DOT's Federal Motor Carrier Safety Regulations and the ICC's leasing regulations. These regulations were promulgated to ensure highway safety and preserve the independent trucking industry. They were expressly not intended to alter the independent relationship between federally-regulated motor carriers and individuals driving vans in interstate commerce. The court below misinterpreted and misapplied these federal regulations by using them as evidence of "control" by interstate motor carriers over independent contractors-drivers, thereby converting such individuals into employees of the carriers for purposes of the California workers' compensation program.

Moreover, the misapplication of the federal regulations by the court below creates a conflict with this Court's decisions under the Commerce Clause of the Constitution. The decision below affects the interstate moving industry in a fashion that violates the Commerce Clause by (a) discriminating against interstate carriers, as opposed to California intrastate carriers, and (b) substantially burdening the interstate transportation of goods to and from California and the interstate activities of motor carriers. It denies interstate motor carriers a legal defense otherwise available to California intrastate motor carriers.

I. THE CALIFORNIA COURT MISINTERPRETED AND MISAPPLIED DOT AND ICC REGULATIONS WHEN IT USED UNITED'S COMPLIANCE WITH THOSE REGULATIONS AS PIVOTAL EVIDENCE OF EMPLOYMENT STATUS.

The California court held that United's compliance with the legal duties imposed by the DOT and ICC regulations constituted key evidence of John Shulda's status as an employee. This represents a misinterpretation and misapplication of these regulations and presents a federal question which this Court can and should address through the exercise of its certiorari jurisdiction. *Yiatchos v. Yiatchos*, 376 U.S. 306, 308 (1964); *see Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 152 (1984); *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 483 (1942). As a matter of federal law, these legal obligations, applicable to *all* interstate carriers, cannot properly be regarded as probative of United's employment relationship with John Shulda.

The obvious purpose of the Federal Motor Carrier Safety Regulations is to promote public safety. The DOT has expressly disclaimed any intent that they "grant, provide or ensure 'rights' to any person." 45 F.R. 46427 (1980). The regulations contain a definition of "employer" that is plainly *not* limited to entities having common law "employees". Indeed, the regulations equate the term "employee" with "driver of a commercial motor vehicle" and expressly recognize that a driver-employee may be "an independent contractor while in the course of operating a commercial motor vehicle." 49 C.F.R. § 390.5. In creating an earlier version of its driver qualification regulations, the DOT expressly affirmed that its use of the term "employs" did not reflect any regulation of "the form of contractual or other arrangement between the carrier and the driver." 35 F.R. 6458 (1970).

Similarly, in promulgating and revising its regulations concerning vehicle leases, the ICC has stated that one of the regulations' purposes is to "promote the stability and economic welfare of the *independent* trucker segment of the motor carrier industry." *E.g.*, 47 F.R. 28396 (1980) (emphasis added). The ICC has recognized that the industry views the owner-operator-driver subject to these regulations as an "independent contractor." *Id. See generally NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 385 (3d Cir. 1979) (all these regulations "are designed to protect the shipping and highway-traveling public, not to facilitate control by the company over the owner-operators").

Thus, the text and the history of these federal regulations plainly belie the interpretation and application by the court below that the regulations create an employment relationship. This Court should grant certiorari to correct an egregious error on this important question of federal law and to prevent this misuse of federal regulations for a purpose never intended by Congress.

Furthermore, the grant of certiorari in this case is necessary to restore uniformity on the federal question of the interpretation of these highly significant regulations. The decision of the court below is inconsistent with the decisions of other state courts and federal courts of appeals which have correctly concluded that compliance with the laws and regulations involved here does not establish an employer-employee relationship, was never intended to establish such a relationship, and is irrelevant to drawing the distinction between an employee and an independent contractor. In *Gibson v. Moore Motor Freight Lines, Inc.*, 246 Minn. 359, 365, 75 N.W.2d 212, 216 (1956), for example, the Minnesota Supreme Court held:

> "[T]here is nothing in the regulation which attempts to define employer-employee relationship for workmen's compensation act purposes or suggests that the Interstate

> Commerce Commission is therein prescribing criteria by which the state courts may determine whether the lessor, or the lessee, in a lease covered by the regulation is the employer of a driver covered thereby."

See also North American Van Lines, Inc. v. NLRB, 869 F.2d 596, 599 (D.C. Cir. 1989) (" '[T]he employer cannot evade the law . . . and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver' "); *Reed v. Industrial Comm'n*, 23 Ariz. App. 591, 534 P.2d 1090, 1094 (1975) ("All drivers in interstate commerce must obey ICC and Department of Transportation regulations as conditions of keeping their license . . . . These rules were not imposed by [the van line] as a means of controlling the owner-operator but were rules imposed by governmental agencies on [the van line] which, in turn, imposed them on its drivers"); *Marine v. Service Trucking Co.*, 225 Md. 315, 170 A.2d 188, 191 (1961) (ICC regulations on leased equipment do not create employee status).

These issues are of enormous importance to the national economy. Between 3,000 and 3,500 drivers are engaged in the interstate transportation of household goods under United's affiliation alone. App. B, *post*, p. A-11. Although most carriers are smaller than United, there are a total of approximately 200,000 interstate motor carriers. 53 F.R. 22280 (1980). The correct interpretation of federal regulations affecting this sizable segment of the work force plainly merits this Court's time and attention.

II. THE CALIFORNIA COURT IMPERMISSIBLY BURDENED INTERSTATE COMMERCE AND VIOLATED UNITED'S CONSTITUTIONAL RIGHTS BY DISCRIMINATING BETWEEN INTERSTATE AND INTRASTATE MOTOR CARRIERS AND BY IMPOSING AN ADDITIONAL COST ON INTERSTATE CARRIERS BASED UPON THEIR COMPLIANCE WITH FEDERAL TRANSPORTATION LAWS AND REGULATIONS.

Although phrased in terms of a grant of Congressional power, the Commerce Clause unquestionably also limits the power of the states to erect barriers against interstate trade and confers a right to engage in such trade free from discriminatory or unduly burdensome state regulation. *E.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980); *Dennis v. Higgins*, ___ U.S. ___, 111 S. Ct. 865, 871 (1991).

California law recognizes that a business is free to use an independent contractor and that when it does it is not subject to the workers' compensation program. *E.g.*, Cal. Labor Code § 3353. By denying interstate carriers this legal privilege, the decision below therefore also implicates this Court's admonition in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988), that:

> "Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the State law will be reviewed under the Commerce Clause . . . ."

The decision below impermissibly burdens interstate commerce and violates United's constitutional rights by subjecting United to the California workers' compensation program merely because as an interstate carrier it complies with federal laws and

regulations. California's use of the federal regulations to establish employment would apply to any interstate carrier, not just United. It would effectively eliminate the ability of interstate carriers to utilize independent contractors and thereby alter thousands of contracts.

A constitutional problem lurks, however, because the DOT and ICC regulations relied on by California as indicia of United's "control" over its drivers govern only interstate carriers like United; an intrastate carrier in California is not subject to the federal regulations. Accordingly, these intrastate carriers can avoid having the particular contractual provisions or duties mandated by the regulations, and under the California court's reasoning intrastate carriers can thereby structure their operations so as to use independent contractors rather than employees.[4]

Thus, the decision below creates a direct distinction between interstate and intrastate carriers. It violates the principle that even when a state is seeking to promote a legitimate purpose it cannot act by "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978); *see also Healy v. Beer Institute, Inc.*, 491 U.S. 324, 340 (1989); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 955 (1982) (recognizing that provision applying only to interstate transactions necessarily implicates Commerce Clause concerns); *Old Coach Development Corp. v. Tanzman*, 881 F.2d 1227, 1232-34 (3d Cir. 1989)

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[4] Although there are state regulations governing California intrastate carriers, they are not as comprehensive as the federal regulations. Thus, there are no state analogs to 49 C.F.R. §§ 391.35, 392.60 and 392.61, and the California law on identification of vehicles, unlike the federal regulations, does not require the vehicle to display the motor carrier's name. *Compare* Cal. Veh. Code § 27900(a) *with* 49 C.F.R. § 1058.2.

(statute which imposed costs only on interstate land transactions discriminated against interstate commerce and was invalid).

This Court has previously noted that state highway regulations are generally entitled to great deference precisely because they usually do not discriminate on their face against interstate commerce. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n. 18 (1978). But because the California court's decision directly restricts the freedom of only interstate carriers, it impermissibly "discriminates *among* affected business entities according to the extent of their contacts with the local economy." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 42. Certiorari should thus be granted to prevent a flagrant disregard for this Court's principles and precedents.

The decision below also creates discriminatory effects that raise a serious Commerce Clause question under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). In that case the Court invalidated a facially neutral North Carolina statute based, in large part, on the fact that it raised the cost of doing business in North Carolina for interstate apple growers and dealers while leaving their intrastate counterparts unaffected. *Id.* at 350-51. United is authorized to operate as an intrastate carrier in California in addition to its primary business of interstate moving. Compared to its intrastate competitors, however, it is now being forced to alter its business practices and is exposed to increased costs. This is the same type of discriminatory impact that infected the North Carolina statute in *Hunt*.

The state regulation here could be valid only if the decision below were justified in terms of the local benefits and the unavailability of non-discriminatory alternatives to preserve whatever local interests are at stake. *Hunt*, 432 U.S. at 353. California has not and, in light of its other laws, cannot establish that there is no non-discriminatory alternative to provide appropriate support for persons such as Jeanette Shulda. This objective can be and has been met by California's use of an insurance

guaranty fund (CIGA) to protect against insolvent insurers and an uninsured employers fund (UEF) to protect against the absence of insurance. *See* Cal. Ins. Code § 1063; Cal. Labor Code § 3716.[5]

Finally, the regulation created by the California decision also merits review under the *Pike* test that state regulation is invalid if the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The fact that the state rules increase the cost of the interstate movement of goods is evidence of an impermissible burden. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. at 445; *Pike v. Bruce Church, Inc.*, 397 U.S. at 145-46. The financial and legal burdens imposed on United and other interstate motor carriers by the decision below are substantial. Jeanette Shulda's claim alone involves $166.67 per week for the remainder of her life (she is only 43 years old) and the expenses of her continuing medical care; it amounted to approximately $400,00 simply for the first eighteen months of her disability. App. B, *post*, p. A-9; App. I, *post*, p. A-69. And in addition to continuing responsibility for the immediate claim, under the decision below United is potentially responsible for 540,000 to 840,000 helpers hired each year by the 3,000-3,500 drivers nationwide who may have contacts with California. The decision below effectively compels United to accept workers' compensation liability for any Californian whom any such driver chooses to designate as his or her "employee." Other interstate motor carriers operating in California

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[5] Furthermore, the time is ripe for this Court to provide greater guidance concerning the scope of *Hunt*. That decision continues to generate confusion among the lower courts attempting to fit it into the Commerce Clause analysis developed by most of this Court's recent decisions on this topic. *Compare Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893, 896-97 (S.D.N.Y. 1989) *with Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 400-02 (3d Cir. 1987).

are necessarily exposed to similar liabilities. These obligations represent an increased cost to the interstate business of hauling household goods to and from California which is plainly significant enough to warrant this Court's review.[6]

These burdens are indeed excessive in relation to any putative local benefits because the decision below does not add anything of substance to the existing workers' compensation program. As already noted, California has a viable, existing system in place to protect its residents who suffer workplace injuries. Here, as in *Lewis*, 447 U.S. at 43, there is no basis for believing that independent contractors driving vans under the aegis of interstate carriers need any more protection or workers' compensation coverage than drivers for intrastate carriers. Here, as in *Bendix Autolite*, there is no basis for depriving interstate carriers of the legal defense or privilege of using independent contractors as drivers.

Moreover, California's interest in providing a measure of medical or financial security to injured residents can be satisfied just as well "with a lesser impact on interstate activities," *Pike*, 397 U.S. at 142, through its present system. California does not need to impose additional burdens on interstate commerce to protect these residents. *Cf. Abramson v. Brownstein*, 897 F.2d 389, 392-93 (9th Cir. 1990). The California courts may well have made a mockery of the California system by their rulings in

---

[6] The decision below also burdens interstate commerce in an additional fashion akin to that recognized in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). There this Court recognized the force of the argument that a state statute which had the effect of discouraging intrastate businesses from entering interstate commerce "burdened" that commerce. *Id.* at 803-05. Here, California intrastate carriers will plainly be deterred from entering the interstate market by this decision, which imposes an additional cost upon them if they do operate on the interstate level. Such a deterrent violates the Commerce Clause. *See Healy v. Beer Institute, Inc.*, 491 U.S. at 340-41.

this case on the coverage obligations of the California Insurance Guarantee Association and the Uninsured Employers Fund, but such errors of state law cannot justify an unconstitutional burden on interstate commerce and blatant discrimination against interstate carriers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael G. Biggers
(Counsel of Record)
John W. Amberg
Robert A. Pallemon
Bryan, Cave, McPheeters &
McRoberts
245 Park Avenue
New York, New York 10167
(212) 692-1800

Counsel for Petitioner

June 1991

APPENDIX

APPENDIX A

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION TWO

E008837

WCAB NO. 85 SBR 110296

UNITED VAN LINES, INC.,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; JEANETTE P. SHULDA,
Respondent.

[Filed: February 22, 1991]

THE COURT:

The petition for writ of review is DENIED as is the ruling was supported by substantial evidence in light of the whole record.

/s/ RAMIREZ, P.J.

cc: W.C.A.B., P.O. Box 6759, San Francisco, CA 94101 (2)

Jack Goodchild
14545 Victory Blvd., #508
Van Nuys, CA 91411

Sacks, Rivera & Solomon
1849 Sawtelle Blvd., #700
West Los Angeles, CA 90025

Ibold & Anderson
3580 Wilshire Blvd., 16th Fl.
Los Angeles, CA 90010

John F. Shulda
3363 Miramont
Rialto, CA 92376

Bryan, Cave, McPheeters & McRoberts
333 S. Grand Ave., #3100
Los Angeles, CA 90071

Uninsured Employers Fund
107 S. Broadway
Los Angeles, CA 90017

W.C.A.B.
107 S. Broadway #4107
Los Angeles, CA 90012

Crymes, Hardie & Heer
1570 The Alameda, #110
San Jose, CA 95126

APPENDIX B

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. 85 SBR 110296

JEANNETTE P. SHULDA,
Applicant

vs.

JOHN SHULDA; CITIZENS MOVING & STORAGE; UNITED VAN LINES, et. al.,
Defendant.

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendants Uninsured Employers Fund ("UEF"), Citizens Moving & Storage ("Citizens") and Royal Insurance Company ("Royal"), and United Van Lines ("United"), separately seek reconsideration of the Findings of Fact and Award issued on July 24, 1990. In that decision, the workers' compensation judge ("WCJ") found that defendant John Shulda was an agent for, and an employee of, Citizens and United and, in that capacity, he employed applicant. The WCJ therefore found that applicant was an employee of Citizens and United, jointly and severally, as well as employee of John Shulda. The WCJ renewed Findings Nos. 2-7 of the May 5, 1987 Findings and Award which was affirmed by Order Granting Reconsideration and Decision After Reconsideration dated July 31, 1987. The WCJ ordered United to pay the Award from January 1, 1990 to the present and continuing and reserved its contribution rights against Citizens, John Shulda, and UEF. The WCJ issued an Amendment to his Opinion on Decision on August 10, 1990, and found that defendant John Shulda was uninsured, but that he was not willfully uninsured.

UEF contends that it is error to reserve the right of contribution against it, asserting that: (1) the liability of UEF is not that of an insurance carrier but is wholly derivative from that of the uninsured employer and that benefits should be awarded only against the uninsured employer; and (2) the legislature did not intend UEF to be a source of contribution to employers or their carriers.

United contends error, asserting that: (1) the finding that John Shulda and Jeannette Shulda were employees of United and Citizens is not justified; (2) a finding that John Shulda was an independent contractor and that Jeannette Shulda was employed by him solely in that capacity is justified; and (3) it is engaged in interstate commerce and under Labor Code section 3203 it is not subject to the provisions of California Workers' Compensation Law.

Citizens contends error, asserting that: (1) the finding that Jeannette Shulda was an employee of Citizens is not justified; (2) a finding that John Shulda was an independent contractor, not an employee of Citizens, and that neither he nor his employee were covered by its insurer is justified; and (3) the finding that Citizens is jointly liable with United is not justified.

We have considered the allegations of the Petitions for Reconsideration filed by United and Citizens and the contents of the Report and Recommendation on Petition for Reconsideration ("Report") of the WCJ with respect to these Petitions. Based on our review of the record, and for the reasons stated in the WCJ's report which we adopt and incorporate, we will deny reconsideration of Unitied's[sic] and Citizens' Petitions for Reconsideration with the following additional comments.

We note that in analogous situations, the courts have found that under Labor Code section 2705.5 an unlicensed contractor who is required to hold a license to perform the work contracted for is considered an employee of the hirer. (*State Compensation*

Insurance Fund v. Workers' Comp. Appeals Bd. (Meier) (1985) 40 Cal.App.3d 5 [50 Cal.Comp.Cases 562]; *Blew v. Earl Horner* (1986) 187 Cal.App.3d 1380 [51 Cal.Comp.Cases 615].) While the facts in *Meier* and *Blew* involved the applicability and interpretation of Labor Code section 2705.5, we believe that the fundamental principles and policies which underlie the Workers' Compensation Act and the fundamental policy that those hiring others to perform services should bear the risk of injuries incurred in the undertaking, as set forth in *Meier* and *Blew*, are applicable to the present matter. We note that by analogy to *Meier* and *Blew*, even if the defendant John Shulda in this matter was an independent contractor, he was uninsured and his principals, United and Citizens, would be liable. We agree, however, with the WCJ in his Report that UEF is correct that it is not jointly and severally liable with the uninsured defendant John Shulda. As noted by the WCJ, there is no demand before him for contribution from UEF and any discussions on the issue of contribution is premature. We will therefore grant reconsideration of UEF's Petition and amend the Award of July 24, 1990, to delete reference to UEF.

For the foregoing reasons,

IT ORDERED that the Petition for Reconsideration filed by Citizens Moving & Storage on August 20, 1990, and by United Van Lines on August 20, 1990, be, and hereby are, DENIED.

IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the Uninsured Employers fund on August 17, 1990, be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the Award of the Findings of Fact and Award issued July 24, 1990, be, AMENDED as follows:

AWARD

AWARD IS MADE in favor of Jeannette Shulda against Citizens Moving and Storage and their insurer, Royal Insurance, and against United Van Lines, and against John Shulda, jointly and severally. The Award is renewed as stated in the Findings and Award of Mav 5, 1987, and affirmed by the Order Granting Reconsideration and Decision after Reconsideration dated July 31, 1987, with the exception of Finding of Fact and Award No. 8 which is amended as follows and awarded herein.

United Van Lines is ordered to pay the Award from January 1, 1990, to the present and continuing. Contribution rights of United Van Lines as against Citizens Moving & Storage and their insurer, Royal Insurance, are reserved, and the same in relation to John Shulda. United Van Lines' rights as against Crum and Forster, dba United States Fire Insurance Company, are not affected by this decision, and are reserved to United Van Lines and further findings on the issue of coverage as between them.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Illegible

I CONCUR,

/s/ Illegible

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
OCT. 16, 1990 /s/ Illegible
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT THE LIEN CLAIMANTS.

CASE NO. 85 SBR 110-296

JEANNETTE P. SHULDA

vs.

UNITED VAN LINES;
CITIZENS MOVING & STORAGE;
JOHN SHULDA, et al.

DATE OF INJURY: JUNE 28, 1984
WCAB JUDGE: PHILIP ARLEN

INTRODUCTION

Three separate Petitions for Reconsideration have been timely filed after the July 24, 1990 "Findings of Fact and Award" in this case. The "Findings of Fact and Award" were that Citizens Moving and Storage and their insurer, Royal Insurance Company, were jointly and severally liable with United Van Lines, John shulda, and the Uninsured Employers' Fund (UEF), for the injury to Jeannette Shulda which left her a quadriplegic.

The UEF's petition claims that they are not liable with the uninsured employer, John Shulda, and discusses the issue of contribution.

United Van Lines (United) claims that neither John Shulda nor his helper, Jeannette Shulda, were employees, and that United ". . . was so engaged in interstate commerce as not to be subject to the legislative power of the State of California . . ." (Petition for Reconsideration, p. 15, lines 4-6).

Citizen's[sic] Moving and Storage (Citizen's[sic]) claims that John Shulda was engaged in work for United with the injury to Jeannette Shulda occurred, and that the contract between Citizen's[sic] and United relieves Citizen's[sic] of liability. Citizen's[sic] also claims that John Shulda was an independent contractor and that there was no joint venture between Citizen's[sic] and United.

Counsel for both Citizen's[sic] and United have provided the Court and the Appeals Board with the same concise, literate briefs that have been indicative of their work throughout this case. Neither defendant could have been better represented. The third defendant, John Shulda, was unrepresented.

The Court refers to the "Opinion on Decision" for a brief chronological review of the case:

> John Shulda purchased a tractor to be a long haul interstate trucker. He leased the tractor to Citizens Moving and Storage, which released it to United Van Lines in 1984. The registration was in the name of Robert Baer, President of United.
>
> John Shulda was required to carry Workers' Compensation insurance. United, through Transprotection, both owned by Uni-Group, obtained this coverage for him from Transit Casualty Company (Transit). Citizens deducted premium payments from his pay.
>
> He signed an "Independent Contractor's Agreement" (UVL Exh A).
>
> Mr. Shulda commenced driving for Citizens and United under this arrangement. He was not allowed to drive for anyone else. He had certain reporting requirements involving United's dispatch office in St. Louis. He had to wear a United Van Lines uniform and abide by United regulations. He could hire a helper, and United either required that he go through certain agencies or otherwise hire someone approved by them.
>
> In 1984, he hired his wife, Jeannette Shulda, as a helper. He informed United of this action. On June 28, 1984, while strapping various items to the inside of the trailer in Massachusetts, a plywood board struck Mrs. Shulda and she fell

into a step-ladder. She was then, and remains to this day, a quadriplegic requiring 24-hour-a-day nursing care.

Transit, a Missouri company authorized to do business in the State of California, made payments for medical care and other benefits amounting to approximately $400,000.00 until January, 1986, when they went into receivership. Payments were made under this policy pursuant to workers' compensation coverage obtained with Transit by Transprotection (owned by Uni-Group, the corporation which also owns United) for and on behalf of John Shulda. With Transit in receivership, the California Insurance Guarantee Association ("CIGA") was joined in this action.

Findings and Award issued against CIGA. The Findings and Award was appealed by CIGA to the Workers' Compensation Appeals Board ("Appeals Board") by way of a "Petition for Reconsideration". The Appeals Board declared that the Transit policy was a "general liability" policy and not a policy of workers' compensation. This relieved CIGA of responsibility for the claim.

The Uninsured Employer's Fund (UEF) subsequently entered into a settlement with the applicant, but changed its mind and petitioned for reconsideration. That led to the opinion by the Court of Appeal on April 15, 1988 (53 CCC 164), that applicant's claim was not a "covered claim" for which CIGA was responsible.

The Finding on employment was noted to be ambiguous and the case was returned to the trial level for further proceedings.

(Opinion, July 24, 1990, pages 1-2)

The "Findings of Fact" of July 24, 1990, was that John Shulda was an agent for, and an employee of, Citizens Moving and Storage (Citizens) and United Van Lines (United). In that

capacity he employed Jeannette Shulda as a helper. Jeannette Shulda was, therefore, an employee of Citizens Moving and Storage and United Van Lines, jointly and severally. Jeannette Shulda was also an employee of John Shulda, uninsured.

DISCUSSION

We shall discuss the UEF's petition at the outset. Petitioner is correct: the UEF is not jointly and severally liable with the uninsured employer, John Shulda. Any discussion of the issue of contribution at this point is premature. The Court and the parties are aware of the law regarding contribution vis-a-vis the UEF, and there is not demand before the court for contribution from the UEF.

We turn now to the petition by counsel for United. The petition acknowledges that the "Independent Contractor Agreement" between John Shulda and Citizens is not dispositive. This element of the "independent contractor/employee" issue was discussed in the Opinion on Decision:

> Citizens had an independent agency agreement with United. The driver (John Shulda) had an agreement with the agency (Citizens). That driver-agency agreement was entitled "Independent Contractor's Agreement". A driver is limited to driving for the van line (United) with whom his agency (Citizens) has an agreement (Summary of Evidence, January 11, 1990, 9:00 a.m., page 6). John Shulda's agreement was with Citizens. Citizens was an agent for United. John Shulda could only drive for United.
>
> The John Shulda-Citizens "Independent Contractor's Agreement" was formulated by counsel for Citizens as agent for United, and took into consideration the requirements of both companies (Summary of Evidence, January 11, 1990, 1:35 p.m., pg. 3).

If John Shulda wanted to haul interstate freight he either signed on with a local agency and was therefore bound to it and its affiliated national van line, or he started his own company. He signed with Citizens, and was therefore bound to United as well. By the estimate of a United Vice-President, Richard Henry Sullivan, there are approximately 535 such representative agencies throughout the United States, and 3,000-3,500 contract truck drivers (Summary of Evidence, January 11, 1990, 9:00 a.m., pg. 2).

It is well-settled in workers' compensation law that the determination of an injured workers' status as either independent contractor or employee does not rest solely on his designation in a "contract". This is sensible; otherwise, every worker could be required to sign an agreement acknowledging that he is an independent contractor and employers would seek to be relieved of any responsibility for industrial injuries.

In *Truesdale v. WCAB*, a cosmetologist was determined to be an employee despite his signature on an agreement that designated him an independent contractor:

> "Truesdale admitted signing the agreement which purported to give him independent contractor status; but that document, of course, is not necessarily dispositive of the issue . . . The workers' compensation system cannot be avoided by direct contract, and subterfuges designed to avoid the workers' compensation laws are not countenanced [cites]" (52 CCC 94, 97-98) . . . "the reality of the relationship, not the parties' understanding, is of primary importance" (*Ibid.*, p. 100)
>
> (Opinion, July 24, 1990, pages 4-6)

United denies that the "Agency Agreement" between itself and Citizens and/or the "Independent Contractor's Agreement" were part of any "subterfuge" (Petition, p. 6, line 20) to avoid the workers' compensation laws; this Court never intended to suggest otherwise. The intent was exactly what United claims: that John Shulda "... was to be considered an Independent Contractor and in no way to be considered an employee of Citizens or United" (Petition, p. 7, lines 2-4). That was the employers' intent, but it need not be and was not the finding of the Court. The finding was an analysis of all aspects of the relationship and legal precedent which led to the conclusion that the overwhelming control by the employer(s) and inequitable bargaining positions (John Shulda had no say in the contract; it was "take it or leave it") resulted in the inescapable conclusion that John Shulda was an employee.

Some of the elements of control were cited in the Opinion:

> John Shulda testified that he had no negotiating power in regard to his agreement with Citizens (Summary of Evidence, July 2, 1989, 1:00 p.m., pg. 3). Mr. Cote, the owner in 1938 of the moving company that became Citizens Moving and Storage in 1952, and president and general manager in 1984, testified that he did not recall any drivers ever — requesting changes in the agreement (Summary, January 11, 1990, 1:35 p.m., pgs. 2-3).
>
> One of the requirements of John Shulda's "Independent Contractor's Agreement" with Citizens was that he have interstate workers' compensation coverage. The contract required that the driver haul freight for United. The contract also required a written and physical examination. His tractor was inspected every three months by Citizens/United. He and his helper(s) were required to wear a United Van Lines uniform; they were subject to discipline if they did not. He was required to inform United's dispatcher in St. Louis daily of his whereabouts. He was required to keep

a daily log and to complete certain inspection reports. If he was late for a pick-up or delivery he was fine $125.00 per day by United. He could not fill his truck with other tonnage even if he had only a partial United load. His tractor was painted in the United colors, gold and white, and had to display the United logo.

United told him where to pick up and deliver goods, where to take them if they could not be unloaded at the destination on the manifest, and sometimes what stops to make en route for additional goods (on the instant trip in which applicant was injured, a stop was made in Phoenix for additional goods). He was dispatched by United's dispatcher in St. Louis. If he turned down any load, profitable or not, he rotated to the bottom of the list. His vacation time was controlled to a certain extent by United (Mr. Sullivan, for United, explained that the "furlough plan" is designed to shut down the drivers' trailers for 2-4 weeks, and that this plan is not directed at controlling driver's vacation periods; nevertheless, it did).

He was required to notify United if he put on a helper, and he could not hire a driver unless qualified by United. Both helper and helper/driver were subject to approval and termination by United.

In John Shulda's opinion " 'nobody is free under this contract . . . you must conform to what United Van Lines wants or you do not work for them' " (Summary, July 28, 1989, 1:00 p.m., pg. 5). He felt that if he refused an assignment he would be " 'put back . . . might sit there forever without a load.' "

(Opinion, July 24, 1990, pages 6-7)

The Court also cited cases in addition to *Truesdale* and *Cartwright* to support its finding. Those cases and their location

in the opinion were *Argonaut Insurance* (Armstrong, p. 8), *Truck Insurance* (Hobson, p. 9), *Home Insurance* (Strickland, p. 12), and *Johnson* (p. 14). Larson's *Workers' Compensation Law*, 1B, section 43.51, citing *Green Valley*, and Larson's *Workers' Compensation Act*, 1B, section 43.42, were also reference (pgs. 13-14).

The full text of the *Cartwright* cite is as follows:

> John Shulda's status as an employee of Citizens and United squares with the facts in the case of *Cartwright Van Line and Fireman's Fund Insurance Company v. WCAB* (Durbin), 42 CCC 800. Substituting Shulda in place of Durbin, Citizens for Del Reye, and United for Cartwright Van Lines, the following digest of the Durbin case is evocative of Shulda's:
>
> > At a hearing on the children's application for benefits the evidence showed that Harold *Durbin* sustained fatal injuries on July 16, 1975, while *driving a tractor which he owned and leased to Cartwright Van Lines*. Durbin was towing a trailer which was owned by Del Reye Van and Storage Company. The evidence showed that Durbin had been listed as an employee by Del Reye until 1969 when Durbin bought the tractor. Thereafter Durbin was listed as an "owner-operator" on Del Reye's books. The evidence also showed that *Durbin performed the same work in the same manner for Del Reye after 1969 as he had before he bought the tractor. The only difference after 1969 was that Durbin received a percentage of the hauling charges whereas before that time he was paid on an hourly basis. also, after 1969 Durbin on his income tax forms indicated he was self-employed.*
> >
> > The evidence also showed that (1) Del Reye was an agent for Cartwright Van Lines, (2) on January 1, 1973

> Cartwright Van Lines leased Durbin's tractor and the Del Reye trailer, and (3) Durbin signed the lease "on behalf of Del Reye and Storage." Thereafter *the tractor-trailer were painted with the Cartwright insignia* and *durbin was encouraged to wear a Cartwright uniform. Cartwright Van Lines also required Durbin to call their dispatcher daily* and to follow the dispatcher's instructions regarding the route he was to drive. *Cartwright Van Lines instructed Durbin regarding the cleaning of his rig, customer relationships, and courtesy.* The evidence further showed that *Durbin (1) could not work for anyone except Cartwright Van Lines or Del Reye and Storage, (2) could not be fired at will by Del Reye*, and (3) was an insured on the same group health insurance policy as "employees" of Del Reye Van and Storage. Durbin paid his own bridge tolls and maintenance charges. *He also bought his own uniforms and paid for any extra help necessary while on the road.*
>
> *The Board held that Durbin was an employee of Del Reye Van and Storage and Cartwright Van Lines* at the time of his death. The Board noted that the manner in which Durbin worked as an admitted employee did not change after he bought the tractor and concluded that *neither the different method used to calculate his pay after he bought the tractor nor his own legal conclusion that he was "self-employed" were sufficient to change his status from an employee to an independent contractor* (emphasis added).
>
> (Opinion, July 24, 1990, pages 9-10)

United correctly points out that the public's perception of an employer's representative as either an independent contractor or an employee is not one of the judicially-determined tests or indicia of control. The Court said:

> One additional point seem in order. From the perception of the public customer, he (the customer), is doing business with United Van Lines. He views United's driver as an extension of the van line. He pays extra (the van line's percentage, the agency's percentage, etc.) for the security perceived in dealing with a nationwide company and the value of its reputation. The customer does not think that he is dealing with an independent driver and that United as no responsibility to him as a customer. Indeed, if there was damage to the freight, inordinate delay, or any other incident resulting in customer dissatisfaction, the customer would look to United for recompense and United would be in the forefront of dispute resolution with him. United cannot and does not avoid responsibility to its customers by invoking the shield of the "Independent Contractor's Agreement". Similarly, it cannot invoke that "Agreement" to deny employer-employee status in a dispute with its driver. (Opinion, July 24, 1990, pages 10-11)

The Court did not cite the "public's perception" as a test or judicially-accepted factor. This was just another element, not controlling, and with or without it, the Court's opinion is still the same: John Shulda was an employee of Citizens and United and, by extension and agency theory, so was his helper, Jeannette Shulda.

Again from the Opinion:

> The requirement for notice to United and Citizens only obtained if the helper accompanied the driver on the truck. It did not apply to those who merely assisted on the docks with loading and unloading. Thus, John Shulda was required to give notice that Jeannette Shulda was his helper, and testimony indicates that this notice was given.
>
> Mr. Shulda testified that he had a choice as to whether or not to hire helpers, but that some jobs could not be completed

in the time required without helpers. He said that United had a "policy" that with certain tonnage there should be a prescribed number of people to load or unload. The helper also had to wear the United uniform.

With the determination of John Shulda's status as an employee, it becomes equally clear that this helper was also an employee. The driver had to have help with certain loads, and he was authorized to hire that help. He was an agent for the company in this regard. As an agent, John Shulda hired Jeannette Shulda and so informed his supervisor at Citizens, whose practice it was to inform the van line.

The case of *Home Insurance Co. v. WCAB* (Strickland; Foster), 47 CCC 432, is analogous to our case.

Foster was a contract truck driver for Logistics Express ("Logex"). Foster owned the tractor pulling a trailer owned by a customer of Logex. Foster had an interstate agreement with Logex which described him as an independent contractor. Foster paid expenses and insurance for his tractor, but did not carry worker's compensation insurance. The Logex insignia was on the tractor and Logex held the interstate hauling permit.

Foster hired Strickland because federal regulations required two drivers on interstate hauls. Strickland had to pass a test given by Logex and be approved by Logex. Logex could fire him. Strickland was driving and Foster was riding in the tractor at the time of the accident which killed Strickland and injured Foster.

The Workers' Compensation Judge found Strickland was jointly and severally employed by Foster and Logex and that Foster was an employee of Logex. The Judge noted that Logex had the "final stamp of approval" necessary to

> complete the hiring of Strickland, and therefore Logex was also Strickland's employer.
>
> In seeking a writ of review, Logex contended exactly what United and Citizens are contending, inter alia, in the Shulda case: that Foster (read "John Shulda") was an independent contractor and Strickland's (read "Jeannette Shulda's") sole employer because the regulation of interstate hauls was required by federal rules and because Foster had sole responsibility for hiring Strickland. Writ was denied.
>
> (Opinion, July 24, 1990, pages 11-13)

United also contends that they are immune from California Workers' Compensation law because they are engaged in interstate commerce. Historically, neither the constitution nor judicial decision support United's contention. Labor Code section 3203 cited by United has an exception within it which may account in part for the long history of cases in which state workers' compensation law has applied to carriers engaged in interstate commerce. Some of these cases have already been cited in the Opinion and in this Report.

Citizen's[sic] has also fined a Petition and, to the extent that this discussion overlaps with the report on United's petition, their contentions are equally rejected.

Citizens was the agency for United and had an "Agency Agreement" with United. There was testimony from United's witnesses that they looked to Citizens to enforce rules and regulations imposed on the drivers (see Summary of Evidence, January 12, 1990, 6:30 a.m., pg. 1, last paragraph, pg. 2, paragraphs 1 & 4).

Although this testimony was, in part, viewed with some disbelief by the court, it is not true (as Citizen's[sic] claims in its Petition, pg. 7, lines 7-9) that no evidence was presented to

support the theory that Citizens was the enforcement arm of United in their relationship with the drivers. This was the consistent position of United as noted in the Opinion:

> Mr. Sullivan attempted in testimony to distance United from the driver by placing the agency in the middle as United's contact and enforcement arm, but ultimately agreed that United could disqualify a driver despite the agency's disagreement with this action (Summary of Evidence, January 12, 1990, 6:30 a.m.).

To the extent that Citizens sought to be a compliant agent for United, they each exercised control over the driver and his helper. Petitioner says:

> "Assuming that Mr. Shulda had hired a wheelchair bound invalid to assist him in unloading the loads which he was carrying, Citizen's[sic] would have no control over that person and no ability to terminate that individual, notwithstanding the fact that they may have felt that the individual was not qualified to perform the functions which he had been hired to perform." (Petitioner, pg. 5, lines 4-11)

It seems to the Court most unlikely that Citizen's[sic] would not intercede with the driver, either on it's[sic] behalf or United's, to block the employ of an unqualified helper. Based on the testimony of United's witnesses, United would have expected such oversight activities from it's[sic] agency.

Much of the petition by Citizen's[sic] is concerned with their relationship to United and the extent of control by each entity. The Court found joint and several liability with the expectation that subsequent briefs would clarify the extent of liability of each party. To have attempted to determine that issue at this point would only further delay benefits to the applicant, who has not received any benefits from any defendant since January, 1986. As stated in the Opinion:

> Citizens' involvement and contribution also remain to be determined. They did not handle interstate shipments. Mr. Cote testified that Citizens had no control over which driver got the loads and that they might have insubstantial contact with the drivers every 4-6 weeks. Nevertheless, they were the enforcement arm of United in this relationship. They were required, for instance, to photograph the truck every 90 days to assure United that its logo was present. Mr. Sullivan testified that United would look to its agent to discipline the drivers or otherwise communicate United's instructions. The liability of Citizens will be ascertained when and if there is a hearing on contribution rights. United has that option if this decision stands. (Opinion, July 24, 1990, pg. 16)

The administration of the claim and provisions of benefits from January 1, 1990, and forward, was placed upon United, the defendant with the clearest liability in this Court's opinion.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration filed by the UEF be granted *only* to delete reference to the UEF in the "Award" of July 24, 1990. To avoid further delay of benefits to applicant, it is recommended that this correction be made by the Appeals Board.

It is respectfully recommended that the petitions filed by Citizen's[sic] and United be denied.

/s/ PHILIP ARLEN
WORKERS' COMPENSATION
JUDGE
WORKERS' COMPENSATION
APPEALS BOARD

DATED: SEP 07 1990 SERVICE BY: Martha Sales

APPENDIX C

Fourth Appellate District, Division Two, No. E008837
S019808

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

UNITED VAN LINES INC.,
Petitioner

v.

WORKERS' COMPENSATION APPEALS
BOARD Et Al.,
Respondents

[Filed: April 11, 1991]

Petition for review DENIED.

/s/ LUCAS
Chief Justice

APPENDIX D

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. 85 SBR 110296

JEANNETTE SHULDA
Applicant

vs.

JOHN F. SHULDA; CITIZENS MOVING & STORAGE; UNITED VAN LINES, et al,
Defendants.

AMENDMENT TO OPINION ON DECISION

This amendment to the "Opinion on Decision" relates only to the word "wilfully" on page 15, line 3. That word should have been omitted before the decision issued. There was no intention to find John Shulda "wilfully" uninsured. To the contrary, he did everything humanly possible to satisfy himself and Citizens Moving and Storage and United Van Lines that he was insured. All parties agreed that he was insured before the Appeals Board's determination that the Transit policy was not one of workers compensation. At the very least, he was insured in Missouri and Transit paid almost $400,000.00 on the claim. Transit assumed liability before their insolvency.

> "An employer who was lawfully insured at the time of an injury and whose insurance carrier becomes insolvent, is relieved from liability. See Lab C section 3759; *Weiser v. IAC* (Waara) (1916) 172C538, 157P593, 3IAC193. A compensation insurer is required, as a condition for doing business in California, to file a surety bond, and, in the event of failure of an insurer to pay an award, the Board may issue its award against the surety. See Ins C section 11690-11720 . . . If the surety bond is insufficient to pay in full the

commuted value of all outstanding awards, payments will ordinarily be made by the California Insurance Guarantee Association. See Ins C section 1063-1063.14. Because of these Insurance Code provisions, an applicant generally is affected by the insolvency or bankruptcy only of an uninsured employer." *California Workers' Compensation Practice*, Third Edition, section 9.31."

Therefore, the word "wilfully" is hereby deleted from page 15, line 3, of the "Opinion on Decision". John Shulda may have been "uninsured" for workers' compensation in California by virtue of the Appeals Board decision, but he was in no way "*wilfully* uninsured".

/s/ PHILIP ARLEN
WORKERS' COMPENSATION
JUDGE

APPENDIX E

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. 85 SBR 110 296

JEANNETTE P. SHULDA,
Applicant

vs.

JOHN SHULDA; CITIZENS MOVING & STORAGE; UNITED VAN LINES, et al,
Defendants.

FINDINGS OF FACT AND AWARD

The above-entitled matter having been heard and regularly submitted, The Honorable Philip Arlen, Workers' Compensation Judge, now makes his decision as follows:

FINDINGS OF FACT

John Shulda was an agent for, and an employee of, Citizens Moving & Storage (Citizens) and United Van Lines (United). In that capacity he employed Jeannette Shulda as his helper. Jeannette Shulda was, therefore, an employee of Citizens Moving and Storage and United Van Lines, jointly and severally. Jeannette Shulda was also an employee of John Shulda, uninsured.

Findings Nos. 2-7 in the Findings and Award of May 5, 1987, are incorporated herein, as affirmed by the Opinion and Order Granting Reconsideration and Decision after Reconsideration dated July 31, 1987.

Finding No. 8: An initial attorney's fee of $7,500.00 shall be awarded herein pursuant to Rules of Practice and Procedure Section 10775, payable jointly to Barry Orlyn and Jack Goodchild,

and said fee shall be commuted. Additional attorney's fees shall be awarded upon properly petition for same, identifying percentage requested based on life expectancy, benefits obtained, and otherwise addressing the guidelines for attorney's fees.

AWARD

AWARD IS MADE in favor of Jeannette Shulda against Citizens Moving and Storage and their insurer, Royal Insurance, and against United Van Lines, and against John Shulda and the Uninsured Employers' Fund, jointly and severally. The Award is renewed as stated in the Findings and Award of May 5, 1987, and affirmed by the Order Granting Reconsideration and Decision after Reconsideration dated July 31, 1987, with the exception of Finding of Fact and Award No. 8 which is amended as above and awarded herein.

United Van Lines is ordered to pay the Award from January 1, 1990, to the present and continuing. Contribution rights of United Van Lines as against Citizens Moving & Storage and their insurer, Royal Insurance, are reserved, and the same in relation to John Shulda and the Uninsured Employers' Fund. United Van Lines' rights as against Crum and Forster, dba United States Fire Insurance Company, are not affected by this decision, and are reserved to United and further findings on the issue of coverage as between them.

/s/ PHILIP ARLEN
Workers' Compensation Judge
Workers' Compensation Appeals Board

CASE NO. 85 SBR 110 296

JEANNETTE P. SHULDA

vs.

JOHN SHULDA; CITIZENS MOVING & STORAGE; UNITED VAN LINES, et al.

DATE OF INJURY: June 28, 1984
WCAB JUDGE: PHILIP ARLEN

OPINION ON DECISION

A brief chronological review of this case is in order. John Shulda purchased a tractor to be a long-haul interstate trucker. He leased the tractor to Citizens Moving and Storage, which released it to United Van Lines in 1984. The registration was in the name of Robert Baer, President of United.

John Shulda was required to carry Workers' Compensation insurance. United, through Transprotection, both owned by Uni-Group, obtained this coverage for him from Transit Casualty Company (Transit). Citizens deducted premium payments from his pay.

He signed an "Independent Contractor's Agreement" (UVL Exh. A).

Mr. Shulda commenced driving for Citizens and United under this arrangement. He was not allowed to drive for anyone else. He had certain reporting requirements involving United's dispatch office in St. Louis. He had to wear a United Van Lines uniform and abide by United regulations. He could hire a helper, and United either required that he go through certain agencies or otherwise hire someone approved by them.

In 1984, he hired his wife, Jeannette Shulda, as a helper. He informed United of this action. On June 28, 1984, while strapping various items to the inside of the trailer in Massachu-

setts, a plywood board struck Mrs. Shulda and she fell into a step-ladder. She was then, and remains to this day, a quadriplegic requiring 24-hour-a-day nursing care.

Transit, a Missouri company authorized to do business in the State of California, made payments for medical care and other benefits amounting to approximately $400,000.00 until January, 1986, when they went into receivership. Payments were made under this policy pursuant to workers' compensation coverage obtained with Transit by Transportation (owned by Uni-Group, the corporation which also owns United) for and on behalf of John Shulda. With Transit in receivership, the California Insurance Guarantee Association ("CIGA") was joined in this action.

Findings and Award issued against CIGA. The Findings and Award was appealed by CIGA to the Workers' Compensation Appeals Board ("Appeals Board") by way of a "Petition for Reconsideration". The Appeals Board declared that the Transit policy was a "general liability" policy and not a policy of workers' compensation. This relieved CIGA of responsibility for the claim.

The Uninsured Employer's Fund (UEF) subsequently entered into a settlement with the applicant, but changed its mind and petitioned for reconsideration. That led to the opinion by the Court of Appeals on April 15, 1988 (53 CCC 164), that applicant's claim was not a "covered claim" for which CIGA was responsible.

The Finding on employment was noted to be ambiguous and the case was returned to the trial level for further proceedings. This decision follows.

EMPLOYMENT:

We wish to address the finding that the policy of insurance which John Shulda (husband of applicant) obtained through

Transit was a general liability policy and not one of workers' compensation. This is a legal fiction that does not comport to any of the involved parties' understanding or belief about said policy.

John Shulda was told by Citizens that workers' compensation coverage was required. He was referred to United which arranged for this coverage by Transit Casualty Company through Transprotection, owned by Uni-Group which also owned United. Transprotection secured for him what all parties believed was a policy of workers' compensation through Transit.[1] The premiums were deducted from Mr. Shulda's checks.

After the injury to Jeannette Shulda which left her a guadriplegic, Transit paid benefits at the workers' compensation rate, including medical care. Transit had deposits with the Insurance Commission in California to guarantee payment of claims in California. The Insurance Commissioner of this State was appointed liquidator for Transit in California.

The Transit policy was intended to be a nationwide workers' compensation policy. Interstate drivers traverse many states. It is not practical for them to obtain a policy in each state from a company based in each state. Transit was based in Missouri but had posted a bond in California. United "base plates" in Missouri and handles nationwide tractor registration centrally from this location. They pay fees to each stated based upon mileage in each state. It was expedient to obtain workers' compensation coverage for their drivers through a Missouri company. John Shulda relied on Transportation to obtain nationwide workers' compensation coverage for him and any persons he hired.

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[1]As one attorney said during the hearing on July 28, 1989: "Everybody in this room" thought that Mr. Shulda had workers' compensation coverage.

John and Jeannette Shulda were residents of California. The contract of hire was made in California. One of the basic tenets for the workers' compensation system was the protection of California residents injured on-the-job. The system is supposed to expedite benefits. The State Supreme Court has ever-expanded this protection, most recently in *S. G. Borello & Sons, Inc. vs. State of California*, No. 5003956, March, 1989. Yet, this protection is denied John and Jeannette Shulda and, worse still, John Shulda becomes subject to a finding of "wilfully uninsured" and liable for his wife's injuries.

It could have been found that this California resident, hired in California, was subject to receiving compensation benefits according to the laws of California (the benefit amounts not being substantially different from those in Missouri). The Workers' compensation provisions are to be "... liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment" (Labor Code Section 3202). "If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside of this state, he . . . shall be entitled to compensation according to the law of this state" (Labor Code section 3600.5).

In *Travelers Insurance Company v. WCAB* (Coakley), the court said: ". . . if we were to allow foreign law to control the agency question, California's policy of protecting injured employees in applicant's situation could be frustrated by an employer's use of an intermediary in a state whose agency law required a result inconsistent with the policy of our statute" (32 CCC 527, 531). What does it matter if the policy obtained by United's sister company, Transprotection, was through an insurer based in Missouri? It was a policy of nationwide coverage and, of necessity, the insurer had to be based somewhere. Are we to allow Transprotection's choice of an insurer to determine the venue, to the detriment of all insureds residing outside that venue?

Must we say that Jeannette Shulda need look to the Missouri equivalent of CIGA (if one exists) to enforce continued payment of benefits under the Transit policy? That is logical but an impossible burden to impose. It also is contrary to that precept of California workers' compensation law which affords protection to its citizens. Must they seek relief in civil court against Transprotection or United or Citizens on a theory o detrimental reliance or some other contractual remedy? Were all other California residents employed by United as interstate contract truckers *uninsured* all those years for workers' compensation in California because Transprotection obtained for them a policy from a Missouri-based company? Certainly it can be said that *the Transit policy was at least the functional equivalent of a workers' compensation policy*, even if strict construction bodes against these two California residents.

To deny benefits and find that Missouri law controls and that this is not even a policy of workers' compensation only defeats the business purpose *and* the protection thought by all to have been provided to interstate truckers, John Shulda among them.

It is hoped that serious reconsideration will be given to this issue by the higher courts if at all statutorily possible. The determination to relieve CIGA of liability by the higher court is controlling, however; this review was necessary because it set the stage for decision against the remaining defendants.

We turn now to a resolution which is independent of the above, for it is conceded and proper that the Court of Appeals' opinion is final and binding on the issue of CIGA's liability.

What was John Shulda's status vis-a-vis Citizens, United, and Jeannette Shulda?

Citizens had an independent agency agreement with United. The driver (John Shulda) had an agreement with the agency (Citizens). That driver-agency agreement was entitled "Inde-

pendent Contractor's Agreement". A driver is limited to driving for the van line (United) with whom his agency (Citizens) has an agreement (Summary of Evidence, January 11, 1990, 9:00 a.m., page 6). John Shulda's agreement was with Citizens. Citizens was an agent for United. John Shulda could only drive for United.

The John Shulda-Citizens "Independent Contractor's Agreement" was formulated by counsel for Citizens as agent for United, and took into consideration the requirements of both companies[2] (Summary of Evidence, January 11, 1990, 1:35 p.m., pg. 3).

If John Shulda wanted to haul interstate freight he either signed on with a local agency and was therefore bound to it and its affiliated national van line, or he started his own company. He signed with Citizens, and was therefore bound to United as well. By the estimate of a United Vice-President, Richard Henry Sullivan, there are approximately 535 such representative agencies throughout the United States, and 3,000-3,500 contract truck drivers (Summary of Evidence, January 11, 1990, 9:00 a.m., pg. 2).

It is well-settled in workers' compensation law that the determination of an injured workers' status as either independent

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[2] It is recognized that there are many requirements that originate with the Department of Transportation (DOT) and therefore are not unique to United. Some of the DOT requirements were made more stringent by United. There were also requirements that United had but Citizens did not. For instance, United required interstate workers' compensation coverage; Citizens did not because it services intrastate customers. The fact that the Interstate Commerce Commission and/or the Department of Transportation impose rules on the interstate trucking industry does not relieve the van lines from the consequences of these rules.

contractor or employee does not rest solely on his designation in a "contract". This is sensible; otherwise, every worker could be required to sign an agreement acknowledging that he is an independent contractor and employers would seek to be relieved of any responsibility for industrial injuries.

In *Truesdale v. WCAB*, a cosmetologist was determined to be an employee despite his signature on an agreement that designated him an independent contractor.

> "Truesdale admitted signing the agreement which purported to give him independent contractor status; but that document, of course, is not necessarily dispositive of the issue . . . The workers' compensation system cannot be avoided by direct contract, and subterfuges designed to avoid the workers' compensation laws are not countenanced [cites] (52 CCC 94, 97-98) . . . "the reality of the relationship, not the parties' understanding, is of primary importance" (Ibid, p. 100)

There are many other "tests" or indicia of status, a primary one being the "right-of-control" test. John Shulda testified that he had no negotiating power in regard to his agreement with Citizens (Summary of Evidence, July 28, 1989, 1:00 p.m., pg. 3). Mr. Cote, the owner in 1938 of the moving company that became Citizens Moving and Storage in 1952, and president and general manager in 1984, testified that he did not recall any drivers ever requesting changes in the agreement (Summary, January 11, 1990, 1:35 p.m., pgs. 2-3).

One of the requirements of John Shulda's "Independent Contractor's Agreement" with Citizens was that he have interstate workers' compensation coverage.[3] The contract required

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[3] "Citizens called United Van Lines to have them arrange for workers' compensation insurance for Mr. Shulda. United gave Citizens a certificate indicating that the driver had coverage" (Summary of Evidence, January 11, 1990, 1:35 p.m., pg. 4).

(Footnote 3 continued next page)

that the drivers haul freight for United. The contract also required a written and physical examination. His tractor was inspected every three months by Citizens/United. He and his helper(s) were required to wear a United Van Lines uniform; they were subject to discipline if they did not. He was required to inform United's dispatcher in St. Louis daily of his whereabouts. He was required to keep a daily log and to complete certain inspection reports. If he was late for a pick-up or delivery he was fined $125.000 per day by United. He could not fill his truck with other tonnage even if he had only a partial United Load. His tractor was painted in the United Colors, gold and white, and had to display the United logo.

United told him where to pick up and deliver goods, where to take them if they could not be unloaded at the destination on the manifest, and sometimes what stops to make en route for additional goods (on the instant trip in which applicant was injured, a stop was made in Phoenix for additional goods). He was dispatched by United's dispatcher in St. Louis. If he turned down any load, profitable or not, he rotated to the bottom of the list. His vacation time was controlled to a certain extent by United (Mr. Sullivan, for United, explained that the "furlough plan" is designed to shut down the drivers' trailers for 2-4 weeks, and that this plan is not directed at controlling drivers' vacation periods; nevertheless, it did).

(Footnote 3 continued)

"It was the drivers' responsibility to obtain workers' compensation coverage but in every instance the drivers asked Citizens to assist with this, and Citizens then turned it over to United Van Lines" (Ibid, pg. 5).

John Shulda testified, "He did not choose the workers' compensation carrier. He 'did not know anything about it.' He said that 'all I know is I paid for it and I thought I had it" (Summary, July 28, 1989, pg. 6).

He was required to notify United if he put on a helper, and he could not hire a driver unless qualified by United. Both helper/driver were subject to approval and termination by United.

In John Shulda's opinion " 'nobody is free under this contract . . . you must conform to what United Van Lines wants or you do not work for them' " (Summary, July 28, 1989, 1:00 p.m., pg. 5).[4] He felt that if he refused an assignment he would be " 'put back . . . might sit there forever' without a load."[5]

United's witness, Mr. Sullivan, claimed that they looked to the agency, Citizens, for enforcement of the rules and disciplining drivers. He said that United could not compel a driver to take a load, but might ask the agency for "assistance" in getting the driver to accept it. He denied that United kept any record of drivers' refusals, but said that certain turndowns "may be documented by the dispatcher for 'future negotiations with the driver'." If a driver refused to wear the United uniform (and he could recall no such occurrences), United "would talk with the agency involved, and probably the driver would not work . . . we would certainly convey our dissatisfaction with the hauling agent . . .".

This testimony only served to reinforce the Court's impression that United controlled. By requesting "assistance" from Citizens, and/or conveying to citizens their "dissatisfaction" with a driver, does anyone seriously believe that Citizens would

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[4] As noted previously, some requirements are imposed on the van lines by the DOT, and passed along through the agencies to the drivers. This does not make the drivers employees of the Federal government. The drivers are qualified by United according to DOT rules, although United can make the restrictions tighter.

[5] Much of the above is Mr. Shulda's testimony; some was refuted by Mr. Sullivan. For instance, Mr. Sullivan said that a driver may stay in the same position on the list or be rotated to the bottom if he refused a load.

support the driver and endanger their revenues from interstate hauling? It was clearly United that had the clout and the leverage in any dispute with a driver.

Mr. Sullivan attempted in testimony to distance United from the driver by placing the agency in the middle as United's contact and enforcement arm, but ultimately agreed that United could disqualify a driver despite the agency's disagreement with this action (Summary of Evidence, January 12, 1990, 6:30 a.m.).

United denied that it has any driver employees. The system of interstate trucking, from the van lines down through the local agencies and their "Independent Contractors' Agreements", seems designed to reinforce this proposition. However, Mr. Shulda was indeed an employee of United Van Lines and Citizens Moving and Storage. They exercised control over him in all major respects; the loads he got, when and where he took them, the time he had to deliver them, the profit he made, the uniform he wore, the potential for discipline, vacation time, etc. When there was a disagreement between him and the company, the company prevailed (Summary of Evidence, July 28, 1989, 1:00 p.m., pg. 6).

The testimony of Mr. Sullivan and Mr. Cote, experienced in their industry and acknowledged by the court to be able and honest professionals, was enlightening as to the standards and practice in the industry. The more information given by these gentlemen in testimony, the clearer the practices in the industry became to this court and the more it was realized just how much control was exercised by the van line and agency over the driver. The fact that the driver was not an office worker at his desk each day in sight of his supervisor is simply attributable to the nature of the business: the driver had to move across state lines from Point A to Point B with freight; an office worker does not. But there the *dis*similarity ends. The driver put in the requisite number of hours each day and was "tracked" by means of his

daily log and call-ins, in addition to the aspects of control mentioned earlier. As a contract truck driver, leasing his cab to the agency which re-leased it to the van line, he had the opportunity for a greater profit margin than an hourly-wage driver with no cab to lease. He also had greater risk and obligation. He even had to pay for the uniform that he was required to wear. Yet the company had little or no obligation to him. They could terminate the relationship with him at will. They deducted from his pay for insurance premiums, medical, workers' compensation, expenses, etc. The employee relationship is as clear as it would be if Mr. Shulda punched a time clock and worked a desk job under the direct supervision of his employer in the next office.

The facts in the instance case are similar to those in *Argonaut Insurance Company and Riss Transportation v. WCAB* (Armstrong), 39 CCC 383. In that case, Carl Armstrong was driving his own leased tractor on a daily basis for Riss, a transportation company, which told him when and where to pick-up and deliver goods. He was paid a percentage for each load, and had the Riss decal on his truck. He was responsible for repairs, expenses, and insurance. The Board found that Armstrong was an employee under the "right-of-control" test. It's[sic] findings of fact were that "(1) truck driving is commonly done by employees, (2) Riss supplied the trailers, (3) Armstrong's services were to be supplied for an indefinite period, (4) Armstrong was paid on the first and fifteenth of each month, (5) the work was part of Riss' regular business, and (6) Armstrong's work did not require any skills in addition to those possessed by comparable drivers . . ." (39 CCC, 383, 384).

In *Truck Insurance Exchange v. WCAB* (Hobson), 40 CCC 403, the driver was also found to be an employee. The truck was registered to the van line, the driver worked only for that van line, his hours and customers were chosen by the van line, no deductions were taken from the driver's pay, and the driver checked in daily. The dispatcher assigned the hauls and determined pick-up and delivery times.

The *Steen* case (40 CCC 62) cited by United (Points and Authorities, pg. 11) has some distinguishing features. First, it turned more on the "substantial evidence" binding the Court of Appeals to a decision after reconsideration by the Workers' Compensation Appeals Board than on a thorough review of the employee-independent contractor issue. The Court of Appeals also acknowledged that "substantial evidence" existed to support a finding of either employment or independent contractor relationship. Second, Steen did "sporadic" work for his alleged employer. Third, "the work being done at the moment of this accident [dislodging a rig that had become stuck in sand] was not a regular part of Contractor's business.

John Shulda's status as an employee of Citizens and United squares with the facts in the case of *Cartwright Van Line and Fireman's Fund Insurance company v. WCAB* (Durbin), 42 CCC 800. Substituting Shulda in place of Durbin, Citizens for Del Reye, and United for Cartwright Van Lines, the following digest of the Durbin case is evocative of Shulda's:

> At a hearing on the children's application for benefits the evidence showed that Harold *Durbin* sustained fatal injuries on July 16, 1975, while *driving a tractor which he owned and leased to Cartwright Van Lines.* Durbin was towing a trailer which was owned by Del Reye Van and Storage Company. The evidence showed that Durbin had been listed as an employee by Del Reye until 1969 when Durbin bought the tractor. Thereafter Durbin was listed as an "owner-operator" on Del Reye's books. The evidence also showed that *Durbin performed the same work in the same manner for Del Reye after 1969 as he had before he bought the tractor. The only difference after 1969 was that Durbin received a percentage of the hauling charges whereas before that time he was paid on an hourly basis. Also, after 1969 Durbin on his income tax forms indicated he was self-employed.*

The evidence also showed that (1) Del Reye was an agent for Cartwright Van Lines, (2) on January 1, 1973 Cartwright Van Lines leased Durbin's tractor and the Del Reye trailer, and (3) Durbin signed the lease "on behalf of Del Reye Van and Storage." Thereafter *the tractor-trailer were painted with the Cartwright insignia* and *Durbin was encouraged to wear a Cartwright uniform. Cartwright Van Lines also required Durbin to call their dispatcher daily* and to follow the dispatcher's instructions regarding the route he was to drive. *Cartwright Van Lines instructed Durbin regarding the cleaning of his rig, customer relationships, and courtesy.* The evidence further showed that *Durbin (1) could not work for anyone except Cartwright Van Lines or Del Reye Van and Storage, (2) could be fired at will be Del Reye*, and (3) was an insured on the same group health insurance policy as "employees" of Del Reye Van and Storage.[6] Durbin paid his own bridge tolls and maintenance charges. *He also bought his own uniforms and paid for any extra help necessary while on the road.*

The Board held that Durbin was an employee of Del Reye Van and Storage and Cartwright Van Lines at the time of his death. The Board noted that the manner in which Durbin worked as an admitted employee did not change after he bought the tractor and concluded that *neither the different method used to calculate his pay after he bought the tractor nor his own legal conclusion that he was "self-employed" were sufficient to change his status from an employee to an independent contractor.* (emphasis added)

One additional point seems in order. From the perception of the public customer, he (the customer), is doing business with

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[6] This last factor was not clearly delineated in the instant (Shulda) case.

United Van Lines. He views United's driver as an extension of the van line. He pays extra (the van line's percentage, the agency's percentage, etc.) for the security perceived in dealing with a nationwide company and the value of its reputation. The customer does not think that he is dealing with an independent driver and that United has no responsibility to him as a customer. Indeed, if there was damage to the freight, inordinate delay, or any other incident resulting in customer dissatisfaction, the customer would look to United for recompense and United would be in the forefront of dispute resolution with him. United cannot and does not avoid responsibility to its customers by invoking the shield of the "Independent Contractor's Agreement". Similarly, it cannot invoke that "Agreement" to deny employer-employee status in a dispute with its driver.

Having found that John Shulda is an employee of both the agency (Citizens) and the van lines (United), what is the status of the person he hired as a helper, Jeannette Shulda?

Testimony about the hiring of a helper was consistent: Citizens and United had to be notified if the driver hired a helper.

Mr. Sullivan said that United did not take part in the hiring of helpers. He said that the DOT requires notice of any helper or passenger travelling with the driver. He also said that United "preferred" that drivers contact certain agencies for casual labor, and that preference extended to the wearing of United attire by casual labor (Summary of evidence, January 11, 1990, 9:00 a.m., pg. 5).

Mr. Shulda said that drivers are supposed to use agency personnel, and to hire their own if the agencies cannot provide it. He said that he did not have sole discretion, and cited an instance where he obtained help from an agency. He said that Citizens and United had to approve helpers, and that he notified Citizens when he hired the applicant.

Mr. Cote of Citizens said that his employee, Mr. Duxbury, mentioned a letter from Mr. Shulda identifying his (Shulda's) wife as his helper. He said that this letter would have been copied by Mr. Duxbury to United, and may have been discarded in the normal course of business. Mr. Sullivan, for United, testified that his company in Fenton, Missouri, made a search for Form SAF38, a letter authorizing the hire of applicant by Mr. Shulda, but he was uncertain about the full extent of the search.

The requirement for notice of United and Citizens only obtained if the helper accompanied the driver on the truck. It did not apply to those who merely assisted on the docks with loading and unloading. Thus, John Shulda was required to give notice that Jeannette Shulda was his helper, and testimony indicates that this notice was given.

Mr. Shulda testified that he had a choice as to whether or not to hire helpers, but that some jobs could not be completed in the time required without helpers. He said that United had a "policy" that with certain tonnage there should be a prescribed number of people to load or unload.[7] The helper also had to wear the United uniform.

With the determination of John Shulda's status as an employee, it becomes equally clear that this helper was also an employee. The driver had to have help with certain loads, and he was authorized to hire that help. He was an agent for the company in this regard. As an agent, John Shulda hired Jeannette Shulda and so informed his supervisor at Citizens, whose practice it was to inform the van line.

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[7] It was unclear whether this referred to on-the-dock laborers only, a helper accompanying him on a trip, or whether this was determined by the nature of the tonnage,distance hauled, etc.; it was also not shown that this was a written or official policy.

The case of *Home Insurance Co. v. WCAB* (Strickland; Foster), 47 CCC 432, is analogous to our case.

Foster was a contract truck driver for Logistics Express ("Logex"). Foster owned the tractor pulling a trailer owned by a customer of logex. Foster had an interstate agreement with Logex which described him as an independent contractor. Foster paid expenses and insurance for his tractor, but did not carry workers' compensation insurance. The Logex insignia was on the tractor and Logex held the interstate hauling permit.

Foster hired Strickland because federal regulations required two drivers on interstate hauls. Strickland had to pass a test by Logex and be approved by Logex. Logex could fire him. Strickland was driving and Foster was riding in the tractor at the time of the accident which killed Strickland and injured Foster.

The Workers' Compensation Judge found that Strickland was jointly and severally employed by Foster and Logex and that Foster was an employee of Logex. The Judge noted that Logex had the "final stamp of approval" necessary to complete the hiring of Strickland, and therefore Logex was also Strickland's employer.

In seeking a writ of review, Logex contended exactly what United and Citizens are contending, inter alia, in the Shulda case: that Foster (read "John Shulda") was an independent contractor and Strickland's (read "Jeannette Shulda's") sole employer because the regulation of interstate hauls was required by federal rules and because Foster had sole responsibility for hiring Strickland. Writ was denied.[8]

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[8] There are obvious differences between the Strickland/Foster case and the Shulda case. One, Strickland was a co-driver referred by Logex to Foster, whereas Jeannette Shulda was a helper (not a driver) only. However, both accompanied the driver in the tractor on the trip. This distinguishes them from on-site helpers who do not travel with the shipment but merely assist on the

(Footnote 8 continued on next page)

Referring once again to *Truesdale* (supra), the court noted that Truesdale's injury, similar to Jeannette Shulda's injury, did not occur in the process of Truesdale applying his cosmetology skills, but rather in an activity that benefitted the business itself. Truesdale was lifting a water bottle; Jeannette Shulda was securing freight in the trailer. Her injury did not occur while simply riding in the tractor (although it is contended that this would have made no difference), but occurred while doing the exact work for which she was hired to the benefit of United: assisting with the loading and unloading of goods belonging to customers of United.

> "The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any workers whose services from a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection. So, for example, a dairy that turns over its milk to an expert cheesemaker in its own factor, pays him at so much per cheese, lets him hire any assistants he pleases, and then takes over the cheese and markets it, is rightly held to be an employer, since it has contracted out the very heart of its own manufacturing process, and since the workman is not in a sufficiently independent business to be expected to carry his own protection." (Larson's *Worker's Compensation Law*, 1B, section 43.51, citing *Green Valley Coop. Dairy v. Industrial Commission*, 27 N.W.2d 454)

(Footnote 8 continued)

dock with the loading and unloading. Two, Strickland had to pass a test given by Logex for drivers, but both Strickland and Jeannette Shulda had to be accepted by the companies (Logex and United, respectively) which could deny approval of their employment.

United claims that it only has various clerical and management employees directing this vast network of goods in interstate transport. It otherwise denies employment of the very heart of its business, that which makes it possible for the goods to be transported: the drivers and the helpers who travel with them.

> ". . . If I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mills, which is an integral part of my lumbering operation, paying him by the load, and reserving no right of control over the details of his work, it is quite possible that this man is as appropriate a subject for compensation protection as any worker that could be found. He is taking a regular and continuous part in the manufacture of my product; his work is hazardous; his rate of pay is such that he and his family cannot be expected to bear the cost of industrial accident; and his place in the industrial process is not such that he could distribute the risk of the protection afforded by the legislation. As a result . . ., the overall development of compensation law shows that the concept has been broadened and altered . . . to fit the peculiar needs and purposes of compensation law. It is significant that in areas where the courts fail or are unable to do this, the legislature frequently fills the gap, so that the net result of legislation and judicial decision ultimately approaches coverage of the persons who need the benefits of the act." (Larson's *Workmen's Compensation Act*, 1B, section 43.42)

The driver and his helper come within the ambit of the class of people that the workers' compensation law is designed to protect. The fact that the employer did not have hands-on control over the manner in which John Shulda drove or Jeannette Shulda helped load and unload does not refute the employment relationship.

In *Johnson v. WCAB*, a cleaning lady was found to be an employee and not an independent contractor. The Court of Appeals considered, among other things, the purpose and intent of the legislation, the persons sought to be protected, and the relative bargaining positions of the parties, ". . . mentally, economically and educationally" (39 CCC 565, 567). Clearly, the driver and helper in our case had little or no bargaining power. The "Independent Contractor's Agreement" was not negotiable. The driver could turn down a load, and he could also quit. Neither option was a viable one.

What is less clear is whether or not the driver became a co-employer along with the agency and the van line. We conclude that he did in this instance, consistent with *Home Insurance Co. v. WCAB* (Foster, supra).

Mr. Shulda hired Jeannette Shulda. He followed procedure and informed United through Mr. Duxbury at Citizens. Jeannette Shulda was required to wear a United uniform and follow company procedure. John Shulda was her immediate supervisor and could terminate her and so could the van line. By extension of John Shulda's employee-agent relationship with United and Citizens, she was also their employee, as well as his, because of the degree of control that all three exercised over her.

With considerable reluctance, the court must find John Shulda wilfully uninsured, although certainly the law was never contemplated to lead to such a tragic result.

CONTRIBUTION AND COVERAGE:

Because of the issue of coverage involving United States Fire Insurance company, and the possibility of contribution Royal Insurance, the Award against United is only effective at this time from January 1, 1990, to the present and continuing. To force an award of four years (January , 1986-January, 1990) on one joint employer, with contribution and coverage issues unresolved,

seems inequitable. Of course, it's no less inequitable that this applicant has been without any benefits during the last 5 years, but the Court feels that providing an award for care from January 1, 1990 through the time that coverage and contribution issues are resolved, is at least some temporary relief. This is an applicant who had dealt courageously with her disability, the sudden and unanticipated termination of benefits in January, 1986, and the vagaries of the legal system thus far. It is hoped that the matter is close to full resolution.

United Van Lines has a dispute with United States Fire Insurance over the issue of coverage. United Van Lines has filed a post-trial brief and points and authorities on this issue. United States Fire Insurance has made one brief "special appearance" and denied coverage, but otherwise has not participated.

To find in favor of the van line on the coverage issue at this point would surely raise a due-process argument from the alleged insurer. While we would like to resolve all issues simultaneously, we find ourselves without sufficient evidence to decide coverage as between United Van Lines and United States Fire Insurance. If this decision and the Award against United Van Lines ultimately stands, we shall notice an immediate hearing (within four weeks; later than that only if the parties request a delay) to determine the coverage issue and full liability for the applicant's entire period of disability. The parties also have rights for any consequential damages in another forum, if not in this one.

Citizens' involvement and contribution also remain to be determined. They did not handle interstate shipments. Mr. Cote testified that Citizens had no control over which driver got the loads and that they might have insubstantial contact with the drivers every 4-6 weeks. Nevertheless, they were the enforcement arm of United in this relationship. They were required, for instance, to photograph the truck every 90 days to assure United

that its logo was present. Mr. Sullivan testified that United would look to its agent to discipline the drivers or otherwise communicate United's instructions. The liability of Citizens will be ascertained when and if there is a hearing on contribution rights. United has that option if this decisions stands.

ATTORNEY'S FEES:

The attorney's fee awarded at this point is partial and not intended to fully compensate the attorneys under the guidelines for attorney's fees.

The Court acknowledges that the skill required to manage this case, to design and implement the best strategy for applicant, is above average. It is not true that the applicant will be taken care of in any event, nor is it true that the money of one defendant is as good as that of any other.[9] The obligations and statutory responsibilities of the Uninsured Employer's Fund are different from those of a private insurer, and may even be different from those of CIGA. The financial consequences to applicant and her spouse resulting from an award must be carefully reviewed. There is also the obvious time expended in trial, trial preparation, reply briefs, etc. The client's best interest must be safeguarded, both personal and financial, and this responsibility must be borne fully by applicant's counsel.

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[9] Testimony of Jeannette Shulda on January 9, 1990, in pertinent part was as follows: "She still has round-the-clock nursing care because she must be turned every hour or she will develop sores. She also cannot care for her sanitary needs or any other functions and requires this care. Most of the nursing care has not been paid for. Medicare has paid for some medical treatment since Transit Insurance stopped paying. She has had to pay for bed pads, catheters and other items not covered by Medicare. She and her husband have also paid for some of the nursing care. They have not been reimbursed for anything."

The care with which this case is managed, the results achieved, etc., will all be given consideration when a petition is before the court for the balance of the fee.

/s/ PHILIP ARLEN
WORKERS' COMPENSATION
JUDGE

APPENDIX F

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CASE NO. 85 SBR 110296

JEANNETTE PAULINE SHULDA,
Applicant

vs.

JOHN F. SHULDA; TRANSIT CASUALTY COMPANY, in receivership; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION,
Defendant

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, Uninsured Employers' Fund (UEF), seeks reconsideration of the Award of October 12, 1988, by which the workers' compensation judge (WCJ) approved the Stipulations With Request for Award (Stipulations) dated September 27, 1988. The Stipulations stated that the Findings and Award had issued on May 13, 1987, as modified by the Board's Opinion and Order Granting Reconsideration and Decision After Reconsideration dated July 31, 1987. The Stipulations further stated that demand had been made on behalf of applicant upon John F. Shulda, Citizens Moving & Storage, Inc., and United Van Lines; that more than ten days had expired; and the UEF be ordered to provide the benefits requested in applicant's attorney's letter of September 19, 1988. The Award of October 12, 1988, stated that it was issued "pursuant to the f[indings] & a[ward] listed" in the Stipulations.

UEF contends that the Award should have been made against applicant's employers: John Shulda, Citizens Moving & Storage, Inc. (Citizens), and United Van Lines (United), inasmuch as UEF's liability is derivative. UEF further contends that the Award is not justified by the findings of fact.

The pertinent history of this case is as follows:

On May 13, 1987, and WCJ issued a Findings and Award in which he found that applicant sustained an industrial injury on June 20, 1984, while employed as a loading and unloading helper by John Shulda in his individual capacity and as an agent for Citizens and United. the WCJ found that Mr. Shulda was an independent contractor insured by a policy provided by United's insurer, Transit Casualty Company (Transit), a Missouri corporation, which was in receivership. The WCJ determined that the California Insurance Guarantee Association (CIGA) was liable for payment of applicant's claim against defunct carrier, Transit.

CIGA sought reconsideration of the WCJ's decision. On July 31, 1987, the Board issued its Opinion and Order Granting Reconsideration and Decision After Reconsideration, finding that the policy provided by Transit was not CIGA's liability. CIGA was, therefore, deleted from the Award. The Board's decision was affirmed by the Court of Appeal in its opinion filed on April 12, 1988.

The matter was set for further hearing on September 27, 1988, pursuant to applicant's Declaration of Readiness to Proceed. The parties then entered into the Stipulations which were approved by the Award of October 12, 1988.

On October 21, 1988, UEF's counsel submitted a letter to the WCJ requesting that an Award be made directly against the uninsured employers, rather than against UEF. The WCJ appears to have treated UEF's request as a petition to reopen and, by his letter dated October 28, 1988, the WCJ informed the parties that the matter would be set for hearing.

UEF's petition for reconsideration then followed.

For the reasons discussed below, we will grant reconsideration, rescind the Award of October 12, 1988, and return this matter for further proceedings.

We note at the outset that the WCJ properly treated UEF's request as a petition to reopen and properly set the matter for hearing. We disagree with the WCJ's assessment, however, that UEF is bound by the Stipulations[1] under the facts of this particular case.

Firstly, UEF appears to be correct in its contentions that the Award must issue against the uninsured employers as a prerequisite to an award against UEF (Lab. Code §§ 3716, 3717) and that the Award is not justified by findings of fact. (See Lab. Code § 5903, subd. (e).) In the present case, the Stipulations of September 27, 1988, stated that they were based on the prior Findings and Award of May 13, 1987, as modified by the Board's decision of July 31, 1987. However, the prior Award issued against the defunct carrier, Transit, and not against any uninsured empoyers[sic]. As such, the Award of October 12, 1988, was not justified by any findings of fact.

Generally, inasmuch as stipulations are designed to expedite hearings, their use in workers' compensation cases is to be encouraged, and the WCJ's discretion to disapprove stipulations does not confer on a party the right to withdraw from a stipulation. However, where a stipulation has been entered into under circumstances which make its enforcement unjust, the WCJ may exercise his discretion to set it aside. (*Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal. Comp. Cases 429].) Here, UEF argues that its rights to collect from the uninsured employers is at stake; as such the Award should be amended to state the names of the uninsured employers.

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[1] See Report and Recommendation on Petition for Reconsideration.

Furthermore, although stipulations are generally binding on assenting parties, and may not be set aside in the absence of good cause rescission (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 865 [44 Cal. Comp. Cases 798, 804]), they do not bind the Board; the Board may disregard the stipulations and base its findings of fact on the evidence or on further testimony. (See Lab. Code § 5702; *Turner Gas Co. v. Workers' Comp. Appeals Bd.* (*Kinney*) (1975) 47 Cal.App.3d 286, 290 [40 Cal. Comp. Cases 253, 255].) California Workers' Compensation Practice (Cont. Ed. Bar 1985) § 8.51, p. 322.) Here, it was error for the WCJ to accept stipulations which did not specify in detail the findings of fact on which they were based and which were not justified by the record. (Cf. *Draper v. Workers' Comp. Appeals Bd.* (1983) 147 Cal.App.3d 502, 507 [48 Cal. Comp. Cases 748, 752].)

Nor are we convinced that the findings on employment are clear from this record. For instance, the employer, John Shulda, is named as the trucker agent for Citizens and for United, and is noted as being an independent contractor. However, it is not clear whether Citizens and its franchisor, United, are deemed to be uninsured employers for the purpose of workers' compensation liability.

Therefore, we will rescind the award, and return this matter to the WCJ for further proceedings on UEF's request to reopen this case. At that time the WCJ can also supplement the record on the issue of employment and the status of Citizens and United. The WCJ may then issue an award against the proper parties. The matters of attorney's fees and outstanding liens may also be determined upon further hearing.

For the foregoing reasons,

IT IS ORDERED that the petition for reconsideration filed by Uninsured Employers' Fund on November 4, 1988, be, and it hereby is, GRANTED.

IT IS FURTHER ORDERED that the Award of October 12, 1988, be, and it hereby is, RESCINDED.

IT IS FURTHER ORDERED that this matter be returned to the workers' compensation judge for further proceedings and new decision consistent with this opinion.

WORKERS' COMPENSATION
APPEALS BOARD

/s/ Jane Maryan O'Neill

I CONCUR,

/s/Illegible
Deputy

APPENDIX G

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

E004686

(Sup. Ct. No. 85SBR11029)

STATE OF CALIFORNIA,
UNINSURED EMPLOYERS FUND,
Petitioner,

v.

STATE OF CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD, CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, et al.,
Respondents.

OPINION

PROCEEDING to review a decision and order of the Workers' Compensation Appeals Board. Decision affirmed.

Department of Industrial Relations, Allan L. Coie, Counsel, Stanley Avnaim, Senior Counsel and John Rea, Chief Counsel for Petitioner.

Richard W. Younkin, William B. Donohoe, Charles E. Finster and William B. Donohoe for Respondent Workers' Compensation Appeals Board.

Clausen, Harris & Campbell, Marie D. Clause and Frederick G. Hall, for Respondent California Insurance Guarantee Association.

Ibold & Anderson and Charles R. Ibold, Jr., for Respondent Royal Insurance Company, appearing on behalf of Petitioner.

Barry M. Orlyn for Respondent Jeannette Shulda.

The State of California's Uninsured Employers Fund (petitioner) seeks review of a decision, after reconsideration by the Workers' Compensation Appeals Board (Board), determining that the claim of Jeannette Shulda (applicant) is not the responsibility of the California Insurance Guarantee Association (CIGA), because it is not a "covered claim" as defined by Insurance Code section 1063.1, subdivision (c)(1).[1] We issued a writ of review, and the matter is now before us for decision.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant became a quadraplegic at the age of 38 as the result of injuries sustained while she was working as a loading helper for her husband, John Shulda (Shulda). At the time of the injuries, Shulda was a trucker agent for Citizens Moving and Storage in Riverside, a franchised agent for United Van Lines

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[1] At the time relevant to the Board's decision, Insurance Code section 1063.1, subdivision (c)(1) recited: " 'Covered claims' means the obligations of an insolvent insurer, including the obligation for unearned premiums, (i) imposed by law and arising out of an insurance policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer, (iii) which are presented as a claim to the liquidator in this state or to the association on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings; (iv) which were incurred prior to, on, or within 30 days after the date the liquidator was appointed; (v) for which the assets of the insolvent insurer are insufficient to discharge in full; (vi) in the case of a policy workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state; and (vii) in the case of other classes of insurance if the policy is issued to a resident of this state or claim against an insured thereunder is made by a resident of this state."

(United), and was insured under a policy (the policy) provided by United's insurer, Transit Casualty Company (Transit), a Missouri corporation.

The policy is entitled "General Liability - Automobile," and includes an "OCCUPATIONAL INJURY INSURING CLAUSE" which recites, in relevant part: "This Company agrees to pay benefits to any insured, and/or his employees, that shall sustain injury, including death resulting from an accident, while under contract to United Van Lines or its authorized agent. . . . The benefit amount so paid shall be the same as if the injured party had been subject to the workers' compensation law of the State of Missouri . . . This insurance does not apply to any obligation for which the Insured and/or his employees or any carrier as his insurer may be held liable under any other collectible insurance, unemployment compensation or disability benefits law, or under any similar law."

The policy also includes a "WORKMEN'S COMPENSATION VOLUNTARY COMPENSATION ENDORSEMENT," which recites, in relevant part: "COVERAGE C-VOLUNTARY COMPENSATION To pay on behalf of the insured, if any employee . . . shall sustain injury, including death resulting therefrom, while employed by the insured in operations in [any] state . . . under circumstances which would have rendered the insured liable for compensation if the injured employee and the insured had been subject to the workmen's compensation law [of Missouri], an amount equal to the compensation and other benefits which would have been payable under such law had the injured employee and the insured been subject to such law with respect to such employment. [¶] The policy does not apply under Coverage C to injury or death which gives rise to a valid claim under any workmen's compensation or occupational disease law."

After the injuries to applicant, Transit voluntarily paid her $166.67 per week and also furnished medical treatment. Applicant later filed an application in California for adjudication of a WCAB claim, naming as defendants both Transit, and Transprotection Service Company, an adjusting agent for Transit. Applicant alleged that the application had been filed because of a disagreement regarding liability for disability, medical expenses, compensation, rehabilitation and attorney's fees.

Thereafter, Transit went into receivership, and the Insurance Commissioner of the State of California (the Commissioner) was appointed liquidator of Transit's affairs. Applicant filed a claim in the liquidation proceedings, and the Commissioner forwarded the claim to CIGA, which, as noted, is required to pay certain obligations of insolvent insurers, including, "in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state" (Ins. Code, § 1063.1, subd. (c)(1)(vi)).

Thereupon, CIGA and the Insurance Commissioner were joined as defendants in applicant's WCAB proceeding. CIGA filed a special appearance and answer alleging that it had been erroneously joined, because applicant's claim did not arise out of a workers' compensation policy issued in California. CIGA also moved to joint petitioner as a defendant, on the grounds that Shulda was uninsured for workers' compensation in California. The motion was granted, and, as a result, petitioner was joined as a defendant.

Thereafter, a hearing was held before a Workers' Compensation Judge (WCJ), and the WCJ then issued a decision finding that applicant had sustained her current injury while employed by John Shulda, acting "in his individual capacity and as agent for Citizens Moving and Storage and United Van Lines, whose compensation carrier was Transit Casualty Company, in receivership; California Insurance Guarantee Association," and award-

ing in favor of applicant and against Transit and CIGA permanent compensation of $166.67 per week for the remainder of applicant's life, plus compensation for past and future medical expenses, and costs and attorney's fees.

On the coverage issue, the WCJ's "OPINION ON FINDINGS AND AWARD" recites, in relevant part: "Transit . . . issued a policy to United . . . with an 'Occupational Injury Insuring Clause' . . . CIGA . . . handles claims made against insureds of Transit . . . The liquidator for Transit . . . asserted [that] 'Transit . . . was domiciled in the State of Missouri but had deposits with the Insurance Commissioner of the State of California . . . as a workers' compensation deposit pursuant to California Insurance Code Sections 11690-11719 *to guarantee the payment of Workers' Compensation claims in the State of California.*' [Emphasis added by WCJ.]

"CIGA's liability arises under Insurance Code ¶ 1063 et seq. CIGA's contention that it is not a covered claim because the policy was not issued in the State of California . . . is not found to have merit. Jurisdiction over this California resident, with contract of hire in California, was acknowledged at trial and is supported by statute and case law. [Citations.] The policy was also signed by a company officer in Los Angeles, California."

CIGA then petitioned the Board for reconsideration. The Board granted the petition, and issued a majority decision after reconsideration amending the WCJ's finding as to Shulda's insurance coverage, *supra*, to delete the portion reciting that United's "compensation carrier" was Transit and thereafter CIGA, and to add the following in its stead: "At the time of injury, Mr. Shulda was insured for liability by Transit Casualty Company, which is now in receivership. *The policy issued to Mr. Shulda was a damages policy which provided that the measure of damages for workers' compensation injuries was to be governed by the law of Missouri.*" (Emphasis added.)

The Board's decision also recited that applicant's claim was not a "covered claim" for purposes of CIGA's liability, because the policy Transit issued to Shulda "does not purport to be a workers' compensation policy"; "does not purport to assume liability for workers' compensation benefits, *per se*," and thus was not a workers' compensation policy under the laws of California, and the Board did not have jurisdiction to order CIGA to furnish benefits thereunder.[2]

This petition followed.

DISCUSSION

Generaly[sic], lest there be any question of the fate of applicant's claim, as a result of these proceedings, she will be taken care of regardless of what we decide. Thus, the broad issue is whether petitioner or CIGA will be responsible. As applicant's attorney stated at oral argument, the money of either entity is "equally good."

In this context, petitioner contends first that the Board erred in ruling that the policy did not qualify as a workers' compensation insurance policy, assigning error because the "VOLUNTARY COMPENSATION ENDORSEMENT" in the policy (see *supra*) is explicitly identified as "WORKMEN'S COMPENSATION." (The Board did not refer to this endorsement in its decision.)

However, a policy which allegedly *includes* an endorsement for workers' compensation insurance, cannot *be* a policy of workers' compensation insurance under section 1063.1. (" 'Covered claims' means the obligations of an insolvent insurer . . . in the case of *a policy of workers' compensation insurance*." (Ins. Code, § 1063.1, subd. (c)(1), emphasis added).

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[2]The dissenting member of the Board stated that she would return the case to the trial level for further proceedings on the issues of employment and insurance coverage.

Moreover, despite the use of the term WORKMAN'S COMPENSATION," the endorsement's coverage is "VOLUNTARY," and expressly *excludes* coverage for *statutory* worker's compensation claims ("The policy does not apply under Coverage C to injury or death which gives rise to a valid claim under any workmen's compensation or occupational disease law"). This exclusion precludes the policy from being one of worker's compensation, because the purpose of a workers' compensation policy is to *provide* coverage for *statutory* compensation claim. ("Workmen's compensation insurance includes insurance against loss from liability imposed *by law* upon employers to compensate employees. . . ." (Ins. Code, § 109, emphasis added.))[3]

Further, even if the endorsement did constitute a policy of workers' compensation insurance, which it did not, the Board's determination that CIGA was not liable thereunder would yet be correct. This obtains, because the benefits the endorsement does provide are those payable under the workmen's compensation law of *Missouri*, and by statute CIGA is liable only for policies which provide benefits under the workers' compensation law of *California* (Ins. Code, § 1063.1, subd. (c)(1)(vi).

Stated differently, "a policy given pursuant to the terms of the [California] Workmen's Compensation Act . . . *must* be construed with reference to the provisions of the Compensation Act." (*Maxfield Wilton etc.* v. *Indus. Acc. Com.* (1937) 19 Cal.App.2d 606, 609, emphasis added.) Conversely, a policy such as the one in the case here (assuming that it is a workers' compensation policy) which is *not* so construed, cannot have been given pursuant to the terms of the California Workers' Compensation Act, and therefore cannot be a "covered claim"

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[3] Although petitioner does not rely as heavily on the policy's OCCUPATIONAL INJURY INSURING CLAUSE," we note that the reasoning we have applied to the endorsement would apply equally to that clause.

for which CIGA is liable under Insurance Code section 1063.1, *supra*.

Petitioner also contends that any "irregular[ity]" in the policy cannot be applied to limit liability thereunder, because the statutory requirements that limited policies be approved by the Insurance Commissioner (Ins. Code, § 11657, ff) were not met. However, those requirements apply only to policies issued under the workers' compensation law of California, and the Board ruled, and we agree, that the policy here is not such a policy. Moreover, the statutes petitioner relies on harm rather than help its position, in that section 11658 recites that "A workmen's compensation policy *shall* not be issued by any insurer unless it is previously approved, as to substance and form, by the [Insurance C]ommissioner" (emphasis added). By arguing that there was no such approval of the policy here, plaintiff is conceding that the policy could not possibly be a policy of workers' compensation under the laws of this state, and hence that CIGA would not be liable thereunder.

Petitioner also contends that the provision in section 1063.1, subdivision (c)(1)(vi) as to the insurer's obligation "to provide workers' compensation benefits under the workers' compensation law of this state" applies to CIGA, and not to Transit. In other words, according to petitioner's argument, CIGA must provide benefits under California law, regardless of whether or not the insolvent insurer's policy of workers' compensation insurance provided such benefits. However, this interpretation is contrary to the plain meaning of the statute (" 'Covered claims' means the obligations *of an insolvent insurer* . . . in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state" (emphasis added)), and, in any event, we repeat once again, the policy is *not* a policy of workers' compensation insurance.

Finally, petitioner contends, if applicant's claim is not "covered" under section 1063.1, subdivision (c)(1)(vi), then it is "covered" under section 1063.1, subdivision (c)(1)(vii) ("in the case of other [i.e., non-workers' compensation] classes of insurance if the policy is issued to a resident of this state or claim against an insured thereunder is made by a resident of this state"). However, if the policy is not a workers' compensation policy, then, as the Board noted, *supra*, it (the Board) would not have jurisdiction to order CIGA to furnish benefits thereunder. Accordingly, any such contention, i.e., under subdivision (c)(1)(vii), must necessarily be addressed to some other tribunal.

DISPOSITION

The decision of the Board is affirmed.

NOT FOR PUBLICATION

/s/ McDaniel
J.

We concur:

/s/ Campbell
P.J.

/s/ Dabney
J.

APPENDIX H

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CASE NO. 85 SBR 110296

JEANETTE PAULINE SHULDA,
Applicant

vs.

JOHN F. SHULDA; TRANSIT CASUALTY COMPANY, in receivership; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION,
Defendant

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, California Insurance Guarantee Association (CIGA), has petitioned for reconsideration from the decision issued by a workers' compensation judge (WCJ) on May 13, 1987 which found that applicant sustained an injury on June 20, 1984 while employed as a loading and unloading helper by John Shulda in his individual capacity and as an agent for Citizens Moving and Storage and United Van Lines. The WCJ found that Mr. Shulda was an independent contractor and that his carrier was Transit Casualty Company, which was in receivership. CIGA contends that the Board does not have jurisdiction over Transit Casualty Company because the policy that insured the employer was a general automobile policy that had an occupational injury insuring clause for operations in all states that designated that benefits were to be paid in accordance with the Workers' Compensation Law of Missouri.

The WCJ found that applicant and defendant, John Shulda, entered into a contract of hire in California on June 3, 1984. On June 28, 1984, in Massachusetts, Mrs. Shulda sustained the injury that is the subject of this case, when she was struck by a plywood board inside Mr. Shulda's trailer, after she had helped unload cargo, according to her testimony.

On February 1, 1982, Mr. Shulda had entered into an "Independent Contractor's Agreement" with United Van Lines[1] whereby Mr. Shulda agreed to drive his trailer exclusively for United in its business of transporting household goods. The contract contained a provision which stated:

> "CONTRACTOR shall, at his expense, provide worker's compensation and employer's liability insurance as required by applicable federal and state law for himself and all personnel employed by CONTRACTOR under the terms of this Agreement. CONTRACTOR will furnish COMPANY with duplicate policies to verify compliance with this paragraph. In the event that CONTRACTOR purchases worker's compensation insurance through COMPANY, upon request, COMPANY will provide CONTRACTOR with a copy of said policy and all charges will be deducted from CONTRACTOR'S monthly statement."

Pursuant to this contract, United, through Citizens, provided Mr. Shulda with insurance by Transit Casualty Company, a Missouri corporation with offices in California. The policy which covered the period from April 1, 1982 to "until cancelled" named United and "Independent Owner/Operators" as the ones to whom the policy was issued. The policy purported to be a "General

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[1] Mr. Shulda testified that defendant Citizens is an agent of United Van Lines (Deposition of February 23, 1987 at p. 9). The policy also lists Citizens as the agent of United Van Lines.

Liability-Automobile" policy.[2] It provided for coverage for "loss of or damage to the automobile, except by collision or upset but including fire, theft, glass and windstorm" as well as "collision or upset," "occupational injury" and "non-trucking liability". The policy also contained an "Occupational Injury Insuring Clause" that stated:

> "This Company agrees to pay benefits to any insured, and/or his employees, that shall sustain injury, including death resulting from an accident, while under contract to United Van Lines or its authorized agent, said injury or death occurring while working for or on behalf of United Van Lines or its authorized agent. The benefit amount so paid shall be the same as if the injured party had been subject to the workers' compensation law of the State of Missouri.
>
> "Each loss, separately occurring, shall be subject to a $250.00 reimbursement for medical payments to the Company by the Certificate Holder.
>
> "This insurance does not apply to any obligation for which the Insured and/or his employees or any carrier as his insurer may be held liable under any other collectible insurance, unemployment compensation or disability benefits law, or under any similar law."

Defendant filed another endorsement, dated April 1, 1982, that stated:

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[2] This language is partially observed in the photocopied policy that has been admitted into evidence.

"MS - Trans - 215 Occupational Injury Insuring Clause Voluntary Compensation Endorsement FWC 4004a is deleted."[3]

After the injury occurred, Transit Casualty Company voluntarily paid applicant indemnity at the rate of $166.67 per week and also furnished medical treatment. The total amount of benefits that are alleged to have been furnished by Transit is approximately $390,000.00

Transit stopped paying benefits on January 1, 1986. Transit went into bankruptcy on January 8, 1986. Its liability for "covered claims" was subsequently assumed by CIGA. The litigation before us was instituted when CIGA refused to furnish benefits to applicant.

In 1969, the California Legislature created the California Insurance Guarantee Association (CIGA). CIGA is an involuntary association of insurers who provide property and casualty insurance in this state, including workers' compensation coverage. (See, generally, Insurance Code §§ 1063-1063.13.) In essence, CIGA collects premiums from its members in order to pay and discharge the obligations of member insurers who become insolvent. (Insurance Code §§ 119.5, 1063.5.) Thus, in the field of workers' compensation, CIGA serves to protect not only industrially-injured employees having claims against insolvent insurers, but also their employers. However, although CIGA is a party in interest in workers' compensation proceedings (Insurance Code § 1063.2(b)), it does not entirely stand in the shoes of the insolvent insurer; it merely discharges the insurer's obligations. (Insurance Code §§ 1063.1(c)(1), 1063.2(a); *Biggs v. CIGA* (1981) 126 Cal.App.3d 641, 645-646; *Saylin v. CIGA* (1986) 179 Cal.App.3d 256, 262.)

---

[3] Although defendant has referred to this endorsement, it has not expressly argued that it rescinds the occupational injury insuring clause.

CIGA will pay only "covered claims." (Insurance Code § 1063.2(a).) For workers' compensation purposes, "covered claims" means the unpaid obligations of the insolvent insurer, imposed by law and arising out of a workers' compensation insurance contract, which obligations were incurred prior to or within 30 days after the liquidator was appointed and which claims were presented to the liquidator or to CIGA before the last date fixed in the liquidation proceedings for the filing of claims. (Insurance Code § 1063.1(c).)

Therefore, the issue of whether the Board has the power to require CIGA to provide benefits turns on the question of whether this is a "covered claim".

Here the policy provided by Transit Insurance Company does not purport to be a workers' compensation policy. It is a General Liability-Automobile policy with an occupational injury insuring clause. It is a policy to insure against damage to Mr. Shulda's vehicle and against liability. It specified that should an occupational injury occur, defendant would pay an unnamed type of "benefits," and that the amount of benefits that would be paid would be governed by the workers' compensation laws of Missouri. But the policy does not purport to assume liability for workers' compensation benefits, *per se*. Thus this policy is not a workers' compensation policy under the laws of California. Therefore applicant's claim is not a "covered claim" for purposes of Insurance Code Section 1063.2(a) and the Board does not have the power for lack of jurisdiction to order CIGA to furnish benefits in this case.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration filed by California Insurance Guarantee Association on June 1, 1987, be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that all Finding issued by the workers' compensation judge on May 5, 1987, be, and hereby is, AFFIRMED, with the exception of Finding No. 1 which is AMENDED to state as follows:

FINDING OF FACT

1. Jeanette Pauline Shulda, born February 24, 1946, did at Groton, Massachusetts, on June 28, 1984, sustain an injury which rendered her a quadriplegic, while employed as a loading and unloading helper by John Shulda, in his individual capacity and as agent for Citizens Moving and Storage and United Van Lines. At the time of injury, Mr. Shulda was insured for liability by Transit Casualty Company, which is now in receivership. The policy issued to Mr. Shulda was a damages policy that provided that the measure of damages for workers' compensation injuries was to be governed by the law of Missouri.

CONCLUSION OF LAW

Applicant's claim for benefits arising out of the injury of June 28, 1984 is not a "covered claim" for purposes of California Insurance Guarantee Association's liability.

ORDER

IT IS ORDERED that applicant take nothing from California Insurance Guarantee Association by reason of this claim.

WORKERS' COMPENSATION
APPEALS BOARD

/s/ Illegible

I CONCUR

/s/ Illegible

I CONCUR IN PART AND DISSENT IN PART. (See Attached Opinion.)

/s/ Jane Morgan O'Neill

CONCURRING AND DISSENTING OPINION

I CONCUR IN PART AND DISSENT IN PART. I would return this case to the trial level for further proceedings on the issues of employment and insurance coverage.

/s/ JANE MORGAN O'NEILL,
Commissioner

APPENDIX I

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CASE NO. 85 SBR 110296

JEANETTE PAULINE SHULDA
Applicant

vs.

JOHN F. SHULDA; TRANSIT CASUALTY COMPANY, in receivership; CALIFORNIA INSURANCE GUARANTEE ASSOC.
Defendant

FINDINGS AND AWARD

Application having been filed herein, all parties having appeared and the matter having been regularly submitted, the HONORABLE PHILIP ARLEN, Workers' Compensation Judge, finds, awards and orders as follows:

FINDINGS OF FACT

L. Jeanette Pauline Shulda, born February 24, 1946, did at Groton, Massachusetts, on June 28, 1984, sustain injury which rendered her a quadriplegic, while employed as a loading and unloading helper by John Shulda, in his individual capacity and as agent for Citizens Moving and Storage and United Van Lines, whose compensation carrier was Transit Casualty Company, in receivership; California Insurance Guarantee Association.

2. Applicant is entitled to a compensation rate of $166.67 per week for both temporary and permanent disability.

3. This injury caused permanent disability of 100%, entitling applicant to $166.67 per week for the remainder of her life.

4. Applicant will require further medical and hospital treatment, including nursing, medicines, medical and surgical supplies, to relieve from the effects of this injury for life.

5. Defendants failed to provide medical treatment and applicant incurred expense therefor, part of which may be payable directly to lien claimants, in an amount to be adjusted by the parties or determined herein upon petition and supporting documents.

6. Applicant incurred expense for nursing care, payable to the following lien claimants:

Kimberly Arthur	$17,052.00
Julie Condoluci	$ 3,192.00
Gino Franco	$ 7,206.00
Roma Lea Burger	$ 3,324.00
Tammy Shulda	$ 2,184.00
Linda Smith	$34,609.80

7. Applicant reasonably and necessarily incurred expense for medical reports in proof of a contested case, payable to lien claimants.

8. Attorney's fee of $6,500.00 shall be awarded herein pursuant to Rules of Practice & Procedure § 10775 unless objection, if any, is filed with this Appeals Board, in writing, within fifteen (15) days; and said fee shall be commuted.

AWARD

AWARD IS MADE in favor of JEANETTE PAULINE SHULDA against TRANSIT CASUALTY COMPANY, in receivership; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION of permanent disability per Finding No. 3; medical

treatment per Finding No. 4; reimbursement of self-procured medical treatment per Finding No. 5; reimbursement of nursing care per Finding No. 6; medical-legal expense per Finding No. 7; and Ruling on attorney's fee and Order for commutation per Finding No. 8.

/s/ PHILIP ARLEN
Workers' Compensation Judge
Workers' Compensation Appeals Board

CASE NO. 85 SBR 110296

JEANETTE PAULINE SHULDA

VS.

JOHN F. SHULDA; TRANSIT CASUALTY COMPANY (CIGA)

WCAB JUDGE: PHILIP ARLEN

INJURY: 6-28-84

OPINION ON FINDINGS AND AWARD

EMPLOYMENT: Applicant was employed by John F. Shulda, an independent contractor whose workers' compensation insurance carrier was Transit Casualty Company through a policy issued to United Van Lines.

The contract of hire was created in California by the June 3, 1984 telephone conversation between the applicant, a California resident at home on that date, and the employer, also a California resident who happened to be in Indiana. Both applicant's and employer's testimony concerning that telephone conversation was consistent and credible.

John Shulda's contract was with Citizen Moving and Storage; his assignments came from United Van Lines only. Both he and his employees wore United Van Lines uniforms in accordance with the dress code.

Although John Shulda's money was comingled[sic] with applicant's, as is common between some married couples, applicant was listed as his employee on the W-2 "Wage and Tax Statement" for 1984. She replaced his previous helper, Charles Shulda. She considered herself to be an employee of John Shulda, and that was his understanding also.

EARNINGS FOR TEMPORARY DISABILITY: Evidence regarding earnings was inconclusive. Applicant claimed $300.00 per week, employer testified similarly, the W-2 supports this, yet nothing was paid. Applicant was paid $166.67 per week for a year-and-a-half by Transit Casualty Company. That sum, tacitly accepted by the parties for those eighteen months, is adopted as the temporary total disability rate.

PERMANENT DISABILITY: Permanent disability is 100% by stipulation. Applicant is a quadriplegic. Applicant is entitled to $166.67 per week as permanent disability for the remainder of her life.

MEDICAL-LEGAL COSTS: Applicant reasonably and necessarily incurred medical-legal costs to be paid by defendants.

SELF-PROCURED MEDICAL TREATMENT: Defendants failed to furnish medical treatment and applicant incurred expense therefor, to be adjusted by the parties or determined herein upon petition and supporting documents. Applicant incurred expense for nursing care, and lien claims are allowed therefor as set forth in the Findings and Award.

FUTURE MEDICAL CARE: Applicant is in need of further medical treatment for the remainder of her life.

INSURANCE COVERAGE: The applicant cannot recover directly from the reinsurers. The reinsurers' obligation by contract is to the primary carrier, Transit Casualty Company, or to its liquidator, Insurance Commissioner of the State of California (see "Order Appointing Liquidator and Restraining Order", Superior Court No. C576985, January 8, 1986).

Transit Casualty Company was qualified to do business in the State of California and had a principal office and designated agent in California (Applicant's Exhibit 6). They issued a policy to United Van Lines with an "Occupational Injury Insuring Clause" (Applicant's Exhibit 2). Transprotection Service Com-

pany, the adjusting agency for United Van Lines, acknowledged the employment of applicant by John Shulda and jurisdiction in the State of California. Transit Casualty Company paid temporary total disability and medical expenses for the period June 28, 1984, through the date of its insolvency, January 1, 1986. Thereafter, a liquidator was appointed and California Insurance Guarantee Association was designated to handle claims against Transit Casualty Company.

California Insurance Guarantee Association (hereinafter "CIGA") handles claims made against insureds of Transit Casualty Company (See "Notice to Creditors", Superior Court No. C576985, January 14, 1986). The liquidator for Transit Casualty Company asserted as follows in its "Application for Order Authorizing Disbursement of Assets to California Insurance Guarantee Association" dated August 6, 1986, p. 2, lines 3-11:

> "... Transit Casualty Company was domiciled in the State of Missouri but had deposits with the Insurance Commissioner of the State of California in the form of U. S. Treasury notes and state government bonds with a total aggregate par value of $5,950,000.00. These securities were placed on deposit with the Insurance Commissioner of the State of California as workers' compensation deposit pursuant to California Insurance Code Sections 11690-11719 *to guarantee the payment of Workers' Compensation claims in the State of California.*" (emphasis added).

CIGA's liability arises under Insurance Code § 1063 et seq. CIGA's contention that it is not a covered claim because the policy was not issued in the State of California ("Special Appearance and Answer", November 4, 1986) is not found to have merit. Jurisdiction over this California resident, with contract of hire in California, was acknowledged at trial and is supported by statute and case law (L.C. § 5305; L.C. § 3600.5; *Travelers Insurance Co. v. WCAB* (Coakley) 32 CCC 527, et al., *California*

Workers Compensation Practice , Third Edition, § 3.24). The policy was also signed by a company officer in Los Angeles, California (Alex Steinhorn, Secretary).

CIGA contends that the clause covering occupational injury was deleted (Defendant CIGA Exhibit AA). The effective date on that document, April 1, 1982, is the same on all other documents comprising the policy. However, the "Voluntary Compensation Endorsement" (Applicant's Exhibit 2, "WC8006a") appears to be a replacement and indicates "End. 2, August 30, 1987." The employer testified at his deposition:

> "Q: Now, you indicated that certain insurances were taken out of—do you call your monthly statement a settlement statement or something like that?
>
> A: Yes, sir.
>
> Q: Okay. Now, how about cargo loss insurance? Does that come—did that also come from—
>
> A: Well, I don't know how they explain it. I can tell you what I get is my workmen's comp., my health and benefits insurance for my family, my truck physical and P.L. and P.D. Other than that, I'd have to look at a statement.
>
> . . .
>
> A: Citizen was the one that acquired the insurance for me, to cover my truck and my workmen's comp., and I was billed monthly by it. I have no knowledge of who the insurance companies were, other than I know the workmans' comp. was through United."
>
> (Deposition of John F. Shulda, February 23, 1987, p. 29, lines 7-17; p. 33, lines 2-6.)

The workers' compensation coverage was in effect and CIGA is liable for the claim. This in no way affects CIGA's contractual rights against the reinsurers.

ATTORNEY'S FEE: It is the intent of this judge to award attorney's fee of $6,500.00 to Mr. Orlyn pursuant to Rules of Practice & Procedure § 10775, *Goler v. Fireman's Fund*, 44 CCC 1065, and other pertinent case law. Said fee shall be commuted. Objection, if any, to this fee should be in writing and must be submitted within fifteen (15) days.

/s/ PHILIP ARLEN
Workers' Compensation Judge

PA:sb

APPENDIX J

[FROM MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED VAN LINES, INC.'S PETITION FOR A WRIT OF REVIEW]

. . . rather than the driver owned the trucks; the tractor was kept at the carrier's terminal and repairs made at its shop; and the carrier chose the driver's hours and customers and collected any insurance proceeds. In *Argonaut Insurance Company v. WCAB (Armstrong)*, 39 C.C.C. 383 (1974), the carrier supplied the trailers, paid the driver, reimbursed him for the compensation of his assistants, and made no deduction for his expenses. And, in *Cartwright Van Lines v. WCAB (Durbin)*, 42 C.C.C. 800 (1977), those who were admittedly employees did exactly the same type of work as the driver in question; the carrier provided driving instructions; and the driver was included in the carrier's health plans and could be fired at will. These authorities are all factually and legally inapposite in the context of this case.

1. *Elements of Control of Means and Manner Resulting From Regulatory Compliance Are Irrelevant to Determination of SHULDA's Relationship with UNITED.*

The factors relied upon by the WCJ fall into two categories. The majority of the cited factors spring solely from UNITED's legal obligation to comply with certain federal laws and regulations arising from its status as an interstate carrier and its concomitant responsibility to ensure compliance by its drivers. The WCJ acknowledged as much, but nonetheless determined that these factors evidence control by UNITED over JOHN SHULDA. ("It is recognized that there are many requirements that originate with the Department of Transportation (DOT) and therefore are not unique to UNITED . . . The fact that the Interstate Commerce commission and/or the Department of Transportation imposes rules on the interstate trucking industry does not relieve the van lines from the consequences of these

rules." *Opinion on Decision*, July 24, 1990 at p. 5 n. 2.) These legal *obligations* which are applicable to *all* interstate carriers are not probative of JOHN SHULDA's relationship with UNITED, much less of the degree of control required to support a finding of employee status.

For instance, the WCJ erroneously concluded that UNITED prohibited JOHN SHULDA from hauling interstate for other carriers (see Item nos. 1, 5 and 9 relied on by the WCJ listed above at pp. 13-14). In fact, the prohibition in question is the product of federal regulatory restrictions on the use of the equipment by interstate carriers. Thus, to prevent illegal combinations by trucking companies in restraint of trade, a Federal pooling order statute prohibits common carriers from mixing their interstate shipments together on the same truck (unless they have obtained prior approval from the ICC). 49 U.S.C. § 11342. That is why JOHN SHULDA was not free to accept loads from different van lines. Furthermore, Federal transportation regulations require that equipment leases provide the carrier lessee (in this case UNITED) with exclusive possession, control, and use of the equipment during the lease period. 49 C.F.R. § 1057.12. This exclusivity requirement applies only to the leased equipment, not to the driver. SHULDA was free to drive interstate for any other carrier; he merely was required to drive a truck other than that which had been leased to UNITED. (January 9, 1990, 9:00 a.m. at p. 1). These same governmental requirements, as opposed to any rules or policies voluntarily promulgated by UNITED, restricted JOHN SHULDA's ability to accept tonnage from other sources even when he had only a partial load.

The requirement that SHULDA pass written and physical examinations (item No. 2 listed at pp. 13-14) in order to qualify as a driver for interstate motor carriers is a regulatory requirement. 49 C.F.R. § 391.35 (written examination requirement); 49 C.F.R. §§ 391.41 and 391.43 (physical examination requirement). Similarly, the requirements (element nos. 3, 6, 7, 10, 14

and 15 above) that SHULDA maintain a daily log (*see* 49 C.F.R. § 395.8), that UNITED inspect his truck (*see* 49 C.F.R. § 396.17), that SHULDA notify UNITED about hiring a helper (*see* 49 C.F.R. § 392.60), that any other individuals who would assist SHULDA with the driving be qualified by UNITED (*see* 49 C.F.R. § 392.61), that SHULDA was required to complete certain inspection reports (*see* 49 C.F.R. § 396.11), and even that SHULDA's tractor bear UNITED's name (*see* 49 U.S.C. 1058.2) all have a regulatory genesis and purpose and do not eminate from UNITED's business interests.

The WCJ's reliance on these factors as a measure of UNITED's control is unsupported by law or by common sense. "[E]mployer efforts to ensure the worker's compliance with government regulations, *even when those efforts restrict the manner and means of performance*, do not weigh in favor of employee status. '[T]he employer cannot evade the law . . . and in requiring compliance with the law he is *not* controlling the driver. *It is the law that controls the driver.*'" *North American Van Lines, Inc. v. N.L.R.B.*, 869 F.2d 596, 599 (D.C. Cir. 1989).

North American Van Lines contains a thoughtful and illuminating discussion and analysis of the relationship between drivers and an interstate common carrier like UNITED. Although *North American Van Lines* arose in the context of NLRB jurisdiction, it is instructive here. The *North American Van Lines* court analyzed the driver-carrier relationship in light of the factors identified in the Restatment of Agency Second — the same factors that the California courts have traditionally used in drawing the employee/independent contractor distinction. Moreover, the California Supreme Court has found the reasoning employed in similar federal decisions apposite to its analysis. *See Borello & Sons v. Department of Industrial Relations*, 48 Cal. 3d at 352, 354-355, 256 Cal. Rptr. at 549, 551.

Indeed, the clear and overwhelming weight of authority deems evidence of restrictions upon manner and means flowing from government regulation to be irrelevant to the determination of employee status for worker's compensation purposes. To do otherwise would effectively eliminate any independent contractor relationship in the interstate transportation of goods and impermissibly burden interstate commerce. While California courts apparently have not decided this issue, all courts addressing the question in other jurisdictions have ruled that an interstate common carrier's compliance with Department of Transportation or Interstate Commerce Commission regulations does not constitute evidence of "control" over the drivers for the purpose of determining employee status. Thus, in *Gibson v. Moore Motor Freight Lines, Inc.*, 246 Minn. 359, 365, 75 N.W.2d 212, 216 (1956), the Minnesota Supreme Court held:

> "[T]here is nothing in the regulation which attempts to define employer-employee relationship for workmen's compensation act purposes or suggests that the Interstate Commerce Commission is therein prescribing criteria by which the state courts may determine whether the lessor, or the lessee, in a lease covered by the regulation is the employer of a driver covered thereby."

Accord, Newland v. Overland Express Inc., — Minn. —, 295 N.W.2d 615, 618 (1980). *See also, Reed v. Indus. Comm.*, 23 Ariz.App. 591, 534 P.2d 1090, 1094 (1975) ("All drivers in interstate commerce must obey ICC and Department of Transportation regulations as conditions of keeping their license. . . . These rules were not imposed by [the van line] as a means of controlling the owner-operator, but were rules imposed by governmental agencies on [the van line] which, in turn, imposed them on its drivers"); *Marine v. Service Trucking Co.*, 225 Md. 315, 170 A.2d 188, 191 (1961) (lease provision "is little more than an obvious compliance with the Interstate Commerce Commission Regulations relating to the transportation of autho-

rized carriers with equipment not owned by them... Neither this provision of the lease, nor any other, gave [the trucking company] the right to control and direct [the driver] in the performance of his work and the manner in which his work was to be done").

Steps taken by UNITED to comply with Federal regulations do not constitute evidence of its control over the driver. These regulations cover all facets of the relationship between UNITED and JOHN SHULDA, from being qualified to drive in UNITED's service to the possibility of suspension because of a failure by the driver to adhere to the regulations. *See Reed v. Indus. Comm'n., supra; Eagen v. K & A Truck Lines, Inc.*, 254 Iowa 914, 119 N.W.2d 805, 807 (1963); *Hunter Constr. Co. v. Morris,*, 388 P.2d 5, 8 (Okla. 1963). True and correct copies of all federal and out-of-state cases cited herein are attached as Exhibit S.

2. *The Remaining Elements of "Control" Relied On by the WCJ Are Not Indicative of Employee Status Because They Either Pertain to the Results of JOHN SHULDA's Services, Were Required Because of the Nature of UNITED's Business, or Merely Reflect the On-going Nature of SHULDA's Services.*

The remaining elements of "control" cited by the WCJ in fact confirm an independent contractor rather than an employment relationship. These elements — that JOHN SHULDA was required to wear a UNITED uniform; that he was required to inform UNITED's dispatcher of his whereabouts; that he was subject to a fine of $125.00 for each day he was late for a pick-up; that his vacation time was controlled to "a certain extent" by UNITED's furlough policy; that UNITED told him where to pick up and deliver goods; and that if he turned down any load, profitable or not, he rotated to the bottom of the list (item nos. 4, 5, 8, 11, 12 and 13 relied on by the WCJ, listed above at pp. 13-14) — simply reflect the nature of UNITED's business, the ongoing basis for SHULDA's services, or the . . .

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OFFICE OF THE CLERK

No. 90-1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED VAN LINES, INC.
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, JEANETTE P. SHULDA, JOHN SHULDA, CITIZENS MOVING AND STORAGE, ROYAL INSURANCE COMPANY, AND CALIFORNIA UNINSURED EMPLOYERS FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

RESPONDENT, JEANETTE SHULDA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK GOODCHILD
Counsel of Record
JACK GOODCHILD
A Professional Law Corporation
14545 Victory Boulevard, Suite 508
Van Nuys, California 91411
(818) 901-1169

Attorney for Respondent
JEANETTE SHULDA

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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JACK GOODCHILD
Counsel of Record
JACK GOODCHILD
A Professional Law Corporation
14545 Victory Boulevard, Suite 508
Van Nuys, California 91411
(818) 901-1169

Attorney for Respondent
JEANETTE SHULDA

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Respondents.

RESPONDENT, JEANETTE SHULDA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Jeanette Shulda respectfully requests that this court deny the petition for writ of certiorari, seeking review of the judgment of the Court of Appeal of California, Fourth Appellate District, Division Two.

STATEMENT OF THE CASE

The decision below upheld the Opinion and Order Granting Reconsideration and Decision after Reconsideration of the respondent Workers' Compensation Appeals Board of the State of California dated October 16, 1990. That decision found that Jeanette Shulda was an employee, both jointly and severally, of her husband John Shulda and his employers United Van Lines, Inc. (petitioner) and Citizens Moving and Storage. Jeanette Shulda was awarded workers' compensation benefits based upon an injury which occurred during the course and scope of her employment on June 28, 1984. This injury rendered Jeanette Shulda a quadriplegic, requiring extensive medical care and round the clock nursing care. Both John and Jeanette Shulda at all times relevant to this matter were and continue to be residents of the State of California.

Originally, Jeanette Shulda's medical care and benefits were paid by Transit Casualty Company. Since January, 1986, due to the liquidation of Transit Casualty Company, Jeanette Shulda has been forced to rely upon Medicare for limited medical care. This situation continues today with our nation's taxpayers being forced to absorb a substantial burden for which petitioner should rightfully be responsible. This inequity is rendered even more egregious by the fact that both Transprotection Services Agency and petitioner are owned by the same privately held parent corporation, Uni-group. It was Transprotection Services Agency which offered and sold to John Shulda the ill-fated policy. This policy was supposed to provide workers' compensation coverage but did not. (See the May 13, 1987 decision of the respondent Workers' Compensation Appeals Board at page A-62 of Petitioner's Appendix). Until now, John

Shulda and his wife Jeanette Shulda have been forced to bear the full weight of the consequences of a decision which was beyond their control. Rather than coming forward to assist the victims of its business practices, petitioner has fought its legal and moral obligation at every turn.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the Petition.

A. The decision below would have been the same in regards to petitioner absent a finding that John Shulda was an employee of United Van Lines.

Both of the questions presented by petitioner presume that a finding below that John Shulda was an independent contractor would have eliminated liability as to respondent Jeanette Shulda by petitioner. This is clearly untrue. The respondent Workers' Compensation Appeals Board stated specifically in its opinion:

> "We note that in analogous situations, the courts have found that under Labor Code section 2705.5 an unlicensed contractor who is required to hold a license to perform the work contracted for is considered an employee of the hirer. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Meier)* (1985) 40 Cal.App.3d 5 [50 Cal.Comp.Cases 562], *Blew v. Earl Horner* (1986) 187 Cal.App.3d

> 1380 [51 Cal.Comp.Cases 615].) While the facts in *Meier* and *Blew* involved the applicability and interpretation of Labor Code section 2705.5, we believed that the fundamental principles and policies which underlie the Workers' Compensation Act and the fundamental policy that those hiring others to perform services should bear the risk of injuries incurred in the undertaking, as set forth in *Meier* and *Blew*, are applicable to the present matter. We note that by analogy to *Meier* and *Blew*, even if the defendant John Shulda in this matter was an independent contractor, he was uninsured and his principals, United and Citizens, would be liable." (Petitioner's Appendix Page A-4).

The applicability of this reasoning to the instant matter is rendered even more appropriate by the fact that John Shulda was uninsured only because of the actions of the petitioner's sister company, Transprotection Services Agency, which selected and sold the faulty policy.

Further, as stated by the trial judge in his Report and Recommendation on Reconsideration (Appendix to Petition Page A-7 at A-18):

> "United also contends that they are immune from California Workers' Compensation law because they are engaged in interstate commerce. Historically, neither the constitution nor judicial decision support United's contention. Labor Code section 3203 cited by United has an exception within it which may account in part for the long history of cases in which state workers' compensation law has applied to carriers engaged in interstate commerce. Some

of these cases have already been cited in the Opinion and in this Report."

The cases referred to by the trial judge delineate the alternative grounds upon which substantial evidence may be found to support the decision reached.

B. The decision below is supported by substantial evidence absent reliance on Department of Transportation and Interstate Commerce Commission regulations.

Petitioner incorrectly presumes that the "right of control" test is the sole basis for a finding of employment. To the contrary, California Law has moved steadily towards a more economically realistic approach to this issue. In his Opinion on Decision, the trial judge refers extensively to Larson's treatise on Workmen's Compensation Law on this point. (See Appendix to Petition pages A-42 and A-43):

> "The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any workers whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection. So, for example, a dairy that turns over its milk to an expert cheesemaker in its own factor, [*sic*] pays him at so much per cheese, lets him hire any assistants

he pleases, and then takes over the cheese and markets it, is rightly held to be an employer, since it has contracted out the very heart of its own manufacturing process, and since the workman is not in a sufficiently independent business to be expected to carry his own protection." (Larson's Workers' Compensation Law, 1B, section 43.51, citing *Green Valley Coop. Dairy v. Industrial Commission,* 27 N.W. 2nd 454) United claims that it only has various clerical and management employees directing this vast network of goods in interstate transport. It otherwise denies employment of the very heart of its business, that which makes it possible for the goods to be transported: the drivers and the helpers who travel with them."

> ". . . If I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mills, which is an integral part of my lumbering operation, paying him by the load, and reserving no right of control over the details of his work, it is quite possible that this man is as appropriate a subject for compensation protection as any worker that could be found. He is taking a regular and continuous part in the manufacture of my product; his work is hazardous; his rate of pay is such that he and his family cannot be expected to bear the cost of industrial accident; and his place in the industrial process is not such that he could distribute the risk of the protection afforded by the

> legislation. As a result . . ., the overall development of compensation law shows that the concept has been broadened and altered . . . to fit the peculiar needs and purposes of compensation law. It is significant that in areas where the courts fail or are unable to do this, the legislature frequently fills the gap, so that the net result of legislation and judicial decision ultimately approaches coverage of the persons who need the benefits of the act." (Larson's Workmen's Compensation Act, 1B, section 43.42)"

"The driver and his helper come within the ambit of the class of people that the workers' compensation law is designed to protect. The fact that the employer did not have hands-on control over the manner in which John Shulda drove or Jeanette Shulda helped load and unload does not refute the employment relationship."

"In *Johnson v. SCAB,* a cleaning lady was found to be an employee and not an independent contractor. The Court of Appeals considered, among other things, the purpose and intent of the legislation, the persons sought to be protected, and the relative bargaining positions of the parties, ". . . mentally, economically and educationally" (39 CCC 565, 567). Clearly, the driver and helper in our case had little or no bargaining power. The "Independent Contractor's Agreement" was not negotiable. The driver could turn down a load,

> and he could also quit. Neither option was a viable one."

Relying on *Home Insurance Company v. WCAB* (1982) 47 CCC 433, the trial judge found that John Shulda was an employee of United Van Lines, Inc. As indicated by the court's reasoning above, the fact of petitioner's compliance with federal regulations played no significant role in reaching this decision. Rather than allowing a mechanical list of factors to decide the issue, the court focused instead on the "economic reality" of the relationship.

Two recent California cases further support this position as applied in the instant matter. In *S.G. Borello & Sons, Inc. v. California Department of Industrial Relations* (1989) 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, the California Supreme Court held that farm laborers are employees despite an agreement in writing that they are independent contractors, and a sharing in the profit or loss from the crop and the ability to manage their own labor. The court points out that the employer in this situation controls the overall operation of its business but simply chooses to accomplish one integrated step of its business by means of worker incentives rather than direct supervision, thereby retaining all necessary control over a job which can only be done one way. The employees are in no practical sense entrepreneurs operating independent businesses for their own accounts. As the court states (48 Cal.3d at 358):

> "Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury." (*Ibid.*) Where the principal offers no real choice of terms, but imposes a particular characterization of the relationship as

> a condition of employment, the workers' acquiescence in that characterization does not by itself establish a forfeiture of the Act's protections. (See *id.* at p. 359.)."

John Shulda testified repeatedly to a lack of bargaining power, both at the inception of and continuing throughout, his relationship with petitioner. All salient issues were determined by fiat by petitioner. Petitioner set the rates to be charged and paid as well as controlling who got which load and when. Petitioner reserved the right to enforce its policies through co-employer Citizens Moving and Storage. Petitioner exceeded federal regulations in the demands it made of its drivers. In general, petitioner sought to have its cake and eat it too by holding itself out to the public as a nationwide trucking company while literally eviscerating itself of the very employee relationships which make the petitioner's business possible. This factual pattern echoes that of *Yellow Cab v. Workers' Compensation Appeals Board* (1991) 277 Cal.Rptr. 434, 226 Cal.App.3d 1288, where the California Court of Appeal, First Appellate District, Division One, citing *Borello (supra)* relied upon California Labor Code sections 3357 and 5705(a) in finding a presumption of employment where the drivers of a taxicab company as active instruments of that enterprise, provided an indispensable and integral service to the employer without which it could not survive.

SUMMARY

In short, petitioner distorts the record by arguing that its compliance with federal regulations played an important role in the lower court's decision. To the contrary, as shown above, the court below, at the very most,

referred tangentially to these rules and based its decision on entirely different and unrelated grounds.

Petitioner further distorts the record by arguing that John Shulda negotiated an independent contractor relationship while the evidence reflects a contract of adhesion imposed by petitioner on a party without any bargaining power whatsoever. Petitioner also misrepresents the holding below. (See page 6 of Petition). Conveniently omitted is the language specifying that John Shulda was "an agent for" petitioner. Clearly implicit in this omitted language is the fact that Jeanette Shulda was an employee of petitioner regardless of whether John Shulda was an employee or not.

CONCLUSION

As no real question of interference with federal law is raised by decision and record below, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACK GOODCHILD
Counsel of Record

JACK GOODCHILD
A Professional Law Corporation

Attorney for Respondent
JEANETTE SHULDA

(3)

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MARLA L. KELLY
Counsel of Record
CHARLES R. IBOLD, JR.
PAULA L. DIONNE

IBOLD & ANDERSON

3580 Wilshire Boulevard, 16th Floor
Los Angeles, California 90010
(213) 380-7330
Attorneys for Respondents

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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MARLA L. KELLY
Counsel of Record
CHARLES R. IBOLD, JR.
PAULA L. DIONNE
IBOLD & ANDERSON
3580 Wilshire Boulevard, 16th Floor
Los Angeles, California 90010
(213) 380-7330
Attorneys for Respondents

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STATEMENT OF THE CASE

This case has been plagued with inconsistent decisions since its inception. Initially, Jeanette Shulda, who was injured during the course of employment with John Shulda, was provided workers' compensation benefits from John Shulda's workers' compensation carrier, Transit Casualty Company ("Transit"). When benefits were discontinued due to the company's insolvency, Shulda filed a claim with the Workers' Compensation Appeals Board ("WCAB"). There, the workers' compensation judge ("WCJ") found that the California Insurance Guarantee Association ("CIGA") was obligated for Mrs. Shulda's benefits. In addition, the WCJ found specifically that Mr. Shulda was an <u>independent</u>

contractor.

After an appeal by Petition for Reconsideration to the WCAB in San Francisco, California, CIGA was relieved of liability after a surprising determination that the Transit policy was for liability and not workers' compensation. It is not known whether Transit's receiver sought reimbursement for the $400,000.00 in benefits paid to Jeanette Shulda pursuant to what it considered a workers' compensation policy. Thereafter, the California Uninsured Employers Fund (UEF) was saddled with liability and subsequently appealed by Petition for Reconsideration to the WCAB in San Francisco. San Francisco then remanded to the WCJ to decide the issue of employment, an issue which had already been determined

at the trial level by the WCJ when he determined Mr. Shulda was an independent contractor.

On remand, the WCJ completely reversed his decision and classified Mr. Shulda as an employee, thereby implicating United Van Lines, Inc. ("United") and Royal Insurance Company ("Royal") the workers' compensation carrier for Citizens Moving and Storage ("Citizens").

Petitioner, United, has subsequently appealed to this Court.

REASONS THE PETITION SHOULD BE DENIED

I. THE QUESTIONS PRESENTED ARE MOOT IF LIABILITY IS IMPUTED TO UNITED VAN LINES, INC. REGARDLESS OF JOHN SHULDA'S EMPLOYMENT STATUS AND, THEREFORE, THE CASE SHOULD BE REMANDED IN LIGHT OF AN OUTSTANDING ISSUE OF STATE LAW.

Petitioner, United, presents two

questions, the underlying effort of which is to declare that John Shulda was not an employee of United, but rather, an independent contractor. Petitioner assumes that if Mr. Shulda is classified as an independent contractor, United would not be liable for the injuries suffered by Mr. Shulda's, employee Jeanette Shulda.

Respondent, Jeanette Shulda, points out in her Brief in Opposition to Petition that the WCJ stated that since John Shulda was uninsured, both United and Citizens would be liable as his principals, whether or not Mr. Shulda was considered an employee or an independent contractor.

This conclusion by the WCJ flies in the face of well settled California law. (See Cal. Labor Code Section 3353,

Section 3357). Respondents, Royal and Citizens, submit that there is no basis for this conclusion and said conclusion is a violation of due process. The WCJ decided this issue without any procedure whatsoever. There was no trial on this issue and no opportunity to be heard by any party. In fact, no party to the action ever introduced the issue, most likely (since holding that a principal is responsible for providing workers' compensation benefits to the independent contractors it hires), directly contradicts the California workers' compensation system.

The United States Supreme Court specifically addressed this issue in Brinkerhoff-Faris Co. v. Hill 281 U.S. 673 (1930). This Court Stated:

> . . . while it is for the state courts to determine the adjective

> as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Id. at 682.

Initially, the WCJ specifically found, after trial, that John Shulda was an independent contractor, thus releasing United and Citizens from any liability. Later, a Petition to Re-open the case was filed by UEF since it was determined that Shulda was uninsured. The Petition was granted and the WCAB returned the matter to the WCJ to determine whether Citizens or United were deemed to be uninsured employers for the purposes of workers' compensation liability.

In a complete reversal of his former

ruling, the WCJ changed his opinion and concluded that Mr. Shulda was an employee of United and Citizens, thus shifting liability to United and Citizens. The WCJ further decided, without precedent or basis in law, that United and Citizens are liable for the injuries to Mr. Shulda's employee whether Mr. Shulda is classified as an independent contractor or an employee.

Respondent maintains that John Shulda was an independent contractor according to the terms of the contract with Citizens and the reality of the relationship between the parties. Respondent further maintains that if any employer/employee relationship existed, that United was Mr. Shulda's employer and not Citizens. For example, the undisputed evidence showed

that Mr. Shulda was required to wear a United uniform, as were his employees. He was required to inform United's dispatcher of his whereabouts. He was subject to fines by United for late pick-ups and deliveries. He was dispatched by United and not Citizens. He could not fill his truck with other tonnage even if he had only a partial United load. He was required to paint his tractor with the United colors and logo. Further, the WCJ stated that United was the defendant with the clearest liability (See Petition, App. B, p. A-20).

Given that the WCJ acted without authority and in violation of due process, Respondents, Citizens and Royal, respectfully request this case be remanded to the WCJ for a

determination of whether liability rests with United and Citizens regardless of Mr. Shulda's classification as an independent contractor or employee, and whether United or Citizens is responsible for providing workers' compensation benefits to the injured.

II. IF JOHN SHULDA IS CONSIDERED AN EMPLOYEE OF UNITED AND CITIZENS, THE DETERMINATION WAS BASED ON A VARIETY OF FACTORS AND FEDERAL REGULATIONS WERE NOT DETERMINATIVE.

Petitioner, United, argues that legal duties imposed by the Department of Transportation ("DOT") and Interstate Commerce Commission ("ICC") regulations constituted key evidence of Mr. Shulda's employment status. As evidence of the WCJ's decision, United cites the WCJ's Opinion, Findings of Fact and Award, July 24, 1990 (Petition, App. E, p.

A-31 to p. A-34).

Citizens and Royal, however, agree with respondent, Jeanette Shulda's argument that the WCJ's decision rested on substantial evidence apart from the DOT and ICC regulations. In addition to Jeanette Shulda's arguments, Citizens wishes to point out that the WCJ specifically commented that some of the DOT requirements were made more stringent by United and there were also requirements that United had but Citizens did not (See Petition, App. E, p. A-31, ft. 2).

Furthermore, Petitioner fails to specify any DOT or ICC regulations which the WCJ allegedly relied on in making his determination. The WCJ cites a great many reasons for Shulda's designation as an employee in his

Opinion and Findings of Fact. None of the reasons are specified as DOT or ICC regulations (See Petition, App E, p. A-24 to p. A-47). Citizens and Royal submit it would be erroneous to determine that the California court based its decision regarding the employment status of John Shulda on compliance with DOT and ICC regulations.

III. IF FEDERAL REGULATIONS COULD NOT BE CONSIDERED IN DETERMINING EMPLOYEE STATUS, MANY TRUCKERS WOULD NOT BE SUBJECT TO ANY WORKER'S COMPENSATION BENEFITS, THEREBY CREATING INTERSTATE CHAOS AMONG INJURED TRUCKERS.

Petitioner indicates that there are 3,000 to 3,500 drivers engaged in interstate transportation under United. In addition, there are a total of approximately 200,000 interstate motor

carriers. To determine that any compliance with ICC and DOT regulations could not be considered in determining employment status would mean that hundreds, if not thousands, of injured truckers would be considered independent contractors and not employees. Thus, a substantial number would have no remedy for injuries occurring during the course and scope of employment. Even those insured could suffer the same fate as John Shulda and be unfortunate enough to insure with an insolvent company.

There must be a party responsible and in control. In the instant case, United provided John Shulda with the ICC permit to operate interstate. ICC regulations require that the permit holder have control over those vehicles

and entities operating under the permit. Citizens had no ICC permit and did not have control over Shulda or his vehicle. Therefore, as the party ultimately responsible and in control, United should be required to deal with the consequences of operating under DOT and ICC regulations.

SUMMARY

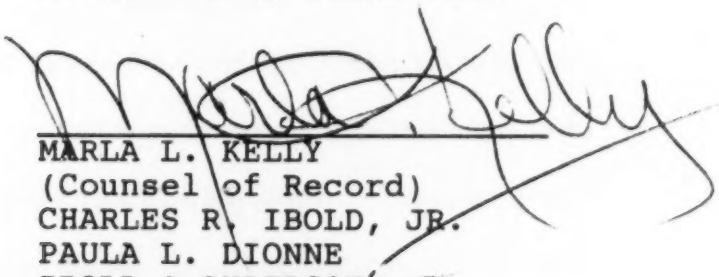
A threshold issue must be addressed which may render the questions presented by the Petitioner moot. Therefore, this case should be remanded to the state level in order to determine the issue of United and Citizens liability if John Shulda is an independent contractor. If the case is not remanded, however, since DOT and ICC regulations did not determine John Shulda's employment status, this

case does not present a federal question.

CONCLUSION

Respondent, Citizens, respectfully requests this case be remanded to determine issues of California law, or, in the alternative, the Petition for Writ of Certiorari be denied.

Respectfully submitted,



MARLA L. KELLY
(Counsel of Record)
CHARLES R. IBOLD, JR.
PAULA L. DIONNE
IBOLD & ANDERSON
3580 Wilshire Blvd.
16th Floor
Los Angeles, CA 90010
(213) 380-7330

Counsel for Respondents,
CITIZENS MOVING & STORAGE
and ROYAL INSURANCE COMPANY

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Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeal of California,
Fourth Appellate District, Division Two

REPLY TO BRIEFS IN OPPOSITION

MICHAEL G. BIGGERS
(Counsel of Record)
JOHN W. AMBERG
ROBERT A. PALLEMON
BRYAN, CAVE, MCPHEETERS & MCROBERTS
245 Park Avenue
New York, New York 10167
(212) 692-1800

Counsel for Petitioner

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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REPLY TO BRIEFS IN OPPOSITION

INTRODUCTION

In their separate briefs in opposition, Respondents Royal Insurance Company and Citizens Moving and Storage and Respondent Jeanette P. Shulda ("Respondents") do not dispute that the petition for a writ of certiorari filed by United Van Lines, Inc. ("United") presents substantial federal questions for this

Court's review.[1] Nor do they challenge the basic premise that compliance with federal regulations cannot be used as evidence of an employment relationship without running afoul of the Commerce Clause. Rather, Respondents seek to avoid review of the California court's decision by erroneously contending that there are independent and adequate state grounds to support that decision.

A fair reading of the record, however, conclusively shows that the federal questions presented by United's petition — the proper construction and application of Department of Transportation and Interstate Commerce Commission regulations, and whether the California court's construction of these federal provisions to create an employment relationship between United and John Shulda impermissibly discriminates against interstate carriers in violation of the Commerce Clause — were so inextricably interwoven with the decision below as to be essential to the judgment in this case. The record contains no indication whatsoever, much less a plain statement, that the decision below was "alternatively based on bona fide, separate, adequate, and independent [state] grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Accordingly, there is no jurisdictional bar to this Court's review, and an opinion by the Court would not be advisory.

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[1] Respondent California Uninsured Employers Fund did not file a brief in opposition.

ARGUMENT

THE COURT HAS JURISDICTION IN THIS CASE BECAUSE THERE ARE NO INDEPENDENT AND ADEQUATE STATE GROUNDS TO BAR REVIEW OF THE CALIFORNIA COURT'S DECISION.

Ordinarily this Court examines the opinion of the state court to determine whether there is an independent and adequate state ground to foreclose the exercise of this Court's jurisdiction to review a state court judgment under 28 U.S.C. § 1257. *See, e.g., Michigan v. Long*, 463 U.S. at 1043-44. In this case there is no written opinion of the California Court of Appeal, and the California Supreme Court denied review of the Court of Appeal's decision without comment. Accordingly, this Court must examine the record below to determine whether there is an independent and adequate state ground to support the decision.

The examination of the record should be guided by the approach formulated in *Michigan v. Long*. There, this Court established the following framework for the exercise of its certiorari jurisdiction: "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, . . . we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. at 1040-41.

Here, no laborious examination of the record or California law is needed to conclude that the judgment was inevitably grounded in the federal questions presented by United and that there are no "bona fide, separate, adequate, and independent" nonfederal grounds to support the judgment. The California court plainly held that United's compliance with legal duties imposed by federal regulations constituted important evidence of John Shulda's status as an employee, and the state court's decision rested in large part on the evidence of United's compliance.

The Workers' Compensation Judge, who acted as the trial court in the workers' compensation proceeding, specifically found that: "It is recognized that there are many requirements that originate with the Department of Transportation (DOT) and therefore are not unique to United .... The fact that the Interstate Commerce Commission and/or the Department of Transportation impose rules on the interstate trucking industry does not relieve the van lines from the consequences [i.e., the creation of an employment relationship because of United's compliance therewith] of these rules." App. E, pp. A-31 to A-34.[2]

The federal questions presented by this case were also interwoven in the Workers' Compensation Appeals Board's reasoning and constituted a nonsegregable basis for its decision that an employment relationship existed between United and John Shulda. *See* App. B, pp. A-12 to A-13, adopted and incorporated by reference at App. B, p. A-4.

In stark contrast, nowhere in the record is there any bona fide, separate, adequate and independent nonfederal ground to support the California court's decision. Respondent Jeanette Shulda's assertion that California Labor Code Section 2750.5 (erroneously cited as Section 2705.5) provides an independent and adequate state ground is wholly untenable as a matter of California law. Labor Code Section 2750.5 creates a rebuttable presumption that a worker performing services for which a license is required under Chapter 9 of Division 3 of the Business and Professions Code, but who fails to obtain such a license, is an employee rather than an independent contractor. By its express terms, however, Chapter 9 of the Business and Professions Code is limited to services provided by "builders" — defined as workers who construct, alter, repair, move, wreck or demolish

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[2] All references are to the Appendix to United's petition for a writ of certiorari.

any building, highway, railroad, or structure — and does not apply to truck drivers such as John Shulda. *See* Bus. and Prof. Code § 7026. Since the undisputed evidence below showed that John Shulda was *not* a worker performing services for which a license is required under that Chapter, no presumption of employee status could be created by Section 2750.5. Hanna, *California Law of Employee Injuries and Workmen's Compensation,* § 4.02[4][d] (2d ed. 1990). Labor Code Section 2750.5 therefore cannot constitute an independent and adequate state ground to preclude review by this Court. *See Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) (jurisdiction cannot be defeated by reliance on state ground "so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the Federal question").

Similarly, the record belies Respondent Jeanette Shulda's contention that the California court's decision was alternatively grounded on a finding that the "economic reality" of the relationship between United and John Shulda created an employment relationship under California law. Nothing in the record indicates that the decision below was separately and independently based on some amorphous economic analysis of the relationship between United and John Shulda; the Workers' Compensation Judge specifically detailed "elements of control" which included United's compliance with federal regulations. App. B, pp. A-12 to A-13.

Moreover, even were there doubt that the federal and state grounds were interwoven, the extensive reliance on the federal grounds to reach the decision in this case justifies plenary review by this Court. *See Oregon v. Kennedy*, 456 U.S. 667, 671 (1982), *citing Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562 (1977). While stressing the need for proper deference to state court judgments, the Court has emphasized that "it is equally important that ambiguous or obscure adjudications by

state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael G. Biggers
(Counsel of Record)
John W. Amberg
Robert A. Pallemon
Bryan, Cave, McPheeters & McRoberts
245 Park Avenue
New York, New York 10167
(212) 692-1800

Counsel for Petitioner

August 1991